TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]68

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

HARRY C. WHEELER, GEORGE B. WILCOX, WALTER DOUGLAS ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

FILED FEBRUARY 11, 1921.

(26933)



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REME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 847.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

;RY C. WHEELER, GEORGE B. WILCOX, WALTER DOUGLAS ET AL.

: TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

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1 In the District Court of the United States for the District of Arizona.

UNITED STATES OF AMERICA *vs.* HARRY C. WHEELER, JOHN C. GREENWAY, GEORGE B. WILCOX, WALTER DOUGLAS, ROBERT RAE, MILES MERRILL, GERALD SHERMAN, MICHAEL J. CUNNINGHAM, JAMES ALLISON, BASSETT T. SHATTUCK, MICHAEL J. BROPHY, PHILIP TOVREA, WILLIAM H. BROPHY, REUBEN A. CLAMPITT, CHARLES H. HUNT, JAMES L. GANNON, VANCE M. JOHNSON, NELSON C. BLEDSOE, JOSEPH P. HODGSON, ALVAN W. HOWE, WILLIAM P. SIMS, HASCAL SNODGRASS, G. H. DOWELL, and H. H. STOUT, defendants.	C-692. Tucson.

Names and addresses of counsel of record in above-entitled case.

Thomas A. Flynn, United States attorney for the District of Arizona, Phoenix, Arizona; William C. Fitts, Assistant Attorney General of the United States of America, Washington, D. C.; Oliver E. Pagan, attorney, Department of Justice, Washington, D. C.; counsel for the United States of America.

Ellinwood & Ross, attorneys at law, Bisbee, Arizona, and Clifton Mathews, attorney at law, Bisbee, Arizona, counsel for defendants.

2 In the District Court for the United States of America for the District of Arizona.

UNITED STATES OF AMERICA *vs.* HARRY C. WHEELER, JOHN C. GREENWAY, GEORGE B. WILCOX, WALTER DOUGLAS, ROBERT RAE, MILES MERRILL, GERALD SHERMAN, MICHAEL J. CUNNINGHAM, JAMES ALLISON, BASSETT T. SHATTUCK, MICHAEL J. BROPHY, PHILLIP TOVREA, WILLIAM H. BROPHY, REUBEN A. CLAMPITT, CHARLES H. HUNT, JAMES L. GANNON, VANCE M. JOHNSON, NELSON C. BLEDSOE, JOSEPH P. HODGSON, ALVAN W. HOWE, WILLIAM P. SIMS, HASCAL SNODGRASS, G. H. DOWELL, and H. H. STOUT, defendants.	C-692. Tucson.

Comes now the grand jury aforesaid, and through their foreman, report that they have found a true bill of indictment against *against* the defendants above named, charging them with conspiracy to deprive a citizen of the rights guaranteed to him by the Constitution and laws of the United States in violation section 19, Penal Code, 1910.

(Minute entry—dated May 11th—Tucson, Arizona.)

3 In the District Court of the United States of America for the District of Arizona. Of the May term in the year 1918, at Tucson.

District of Arizona, *ss:*

First count.

The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the district of Arizona at the May term of said court in the year 1918, and inquiring for said district, upon their oath present, that before and on the twelfth day of July, in the year nineteen hundred and seventeen, S. Y. Abercrombie, Joe Absetz, R. F. Aldridge, Chris Allen, Francisco Arvizu, Rudolf Bahor, Chris Baker, W. H. Burney, Nels Bendixen, Henry Berger, W. A. Bevan, William Blackburn, Frank Birmingham, J. B. Borroum, C. B. Briscoe, Ernest Brown, Fred. W. Brown, Charley Brown, Sam Brooks, L. F. Burgert, David Burns, J. B. Campbell, Gust Carlson, Pete Caretto, Charles Carroll, Virgil B. Carter, James Casey, J. P. Chase, Loyd W. Chapin, William B. Cleary, Mike A. Conrad, W. A. Cook, Phil Courtney, F. L. Crawford, A. E. Crawford, Forest Creager, Ed. Critchley, Jack Crowl, Arthur Dannie, C. H. Davis, Nick Delaney, Alfred Monroe Deming, Richard Denning, Charles Dimmitt, R. A. Dorame, S. C. Dorey, Phil Douglass, H. A. Earnest, J. W. Eastburn, Charles Ellenwood, Frank Elliott, L. Ellis, Thomas N. English, Leo Entner, Pierre Ewert, William Favor, George Forrester, Thomas Gibbons, Oscar H. Green, Thomas G. Green, Charles W. Grupe, Harry Handly, Tim Hadsall, Erik Hallin, Felix Hanhila, G. B. Harmon, J. F. Harrington, Joseph Harrington, Peter L. Harrington, Walter Harrington, Wyatt Harris, Ralph Hart, Harry

4 D. Hartwick, Robert M. Heath, John Heikkila, A. C. Hendrick, Frank Hester, Fred Hofheinz, Harry Hogan, James Hogan, Michael E. Hogan, J. F. Holman, Harry Howard, J. H. Huber, John Hunt, Harvey S. James, Robert R. Jones, O. W. Johnson, Roy O. Johnson, Edward J. Johnston, William E. Keate, Joseph L. King, Edward Klausner, Ben Koenigs, Anton Krall, Dan Krich, Fred Lagori, Richard Langdon, W. Skochelich Lawrence, C. W. Leitz, Albert Lindkvist, Clifford Linn, W. H. Lithgow, T. H. Loftus, Ysidro Y. Lopez, Charles D. Loydahl, John Lyng, Charley McGourty, J. D. McCoy, J. C. McCutcheon, J. T. McDaniel, James McGaffegan, D. E. McIntosh, J. P. Magner, Oscar E. Malin, Richard Manner, Coronado Martinez, Gust Mattson, Emile Maumus, Wm. F. Mowatt, Eli May, Scott Melville, Leon E. Metz, William C. Moodie, F. S. Moore, F. A. Morgan, Fred Moss, John E. Murphy, George J. Murphy, Bernard Meyers, Dee Carroll Nations, E. M. Neal, Peter Nestley, R. G. Noble, Jack F. Norman, W. M. Norris, T. J. O'Brien, Frank O'Connor, John J. O'Donnell, W. E. Oxley, Victor Pajunen, Walter Parker, Jack Parks, Robert E. Pastors, Roy Patton, Russell Pence, Wm. H. Persing, Louis Peterson, Alfonse

Phillips, C. B. E. Phillips, George T. Philips, J. L. Phillips, L. E. Pollard, Peter Powell, Pite Prlia, Carl L. Pyeatt, Ramon Quiros, J. L. Ramsey, Joe Reddy, Ben Reep, James Reilly, W. V. Rein-Schmidt, John Ribinski, Harry Richards, Jack Ringo, M. J. Roche, Wm. R. Rogers, Markus Schutte, Gus Selin, Felix Segulja, Matt K. Soori, L. C. Sharp, Mike Simmons, George Henry Sims, Gottlieb Schmidt, Frank Elmer Smith, Eugene Smith, J. S. Smith, Griffin Hiram Stollings, Jesse L. Stollings, Stanly Stonis, George Stretch, Anton Stukel, S. Summers, Charles E. Sullivan, John Sullivan, N. O. Sullivan, Rudolph Swetish, N. S. Sweet, Stephen Swetish, Charles E. Tannehill, E. B. Taylor, F. G. Taylor, Clint Thomas, Henry Thomas, Bradly Thompson, Fred M. Turnboo, Walter E. Varnes, John Veale, George Vucurevich, R. A. Waddill,
5 Charles Wagner, Ben K. Webb, R. W. Webb, Charles C. Weiss, G. W. Wercinski, H. K. West, Ed Williams, J. S. Wofford, Charles Wohlschlegel, Roger Wolfe, Frank Wheeler, George White, H. F. Whitman, C. F. Wilson, W. J. B. Wilson, Orville Wright, R. F. Wright, Oscar Wylund, Robert Young, and Nick Zoro were citizens of the United States residing in the county of Cochise, in the State and in said district of Arizona, in the peace of said county, State, and district, and then and there, as such citizens of the United States, were exercising the right and privilege pertaining to citizens of said State peaceably there to reside and remain, and to enjoy the blessings of liberty, rather than in another State of the United States, and the right and privilege pertaining to citizens of said State to be immune from unlawful deportation from that State to another State; and then and there were not persons charged in any State with treason, felony, or other crime, who had fled from justice of such State and been found in said State of Arizona, or persons found in said State of Arizona who had committed crimes or offenses against the United States in another State or in other States, or persons under sentence of imprisonment in a prison or prisons located in another State or in other States, or persons subject to extradition to a foreign country or foreign countries.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that continuously and all times throughout the period of time from the first to and including said twelfth day of July, in the year aforesaid, at and within said county of Cochise, and in said district of Arizona, Harry C. Wheeler, John C.
6 Greenway, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, and Hascal Snodgrass, and G. H. Dowell and H. H. Stout, whose Christian names are to said grand jurors unknown, hereinafter

referred to as defendants, well knowing all the premises aforesaid, unlawfully and feloniously did conspire, combine, confederate, and agree together, and with divers other persons to said grand jurors unknown, to injure, oppress, threaten, and intimidate said citizens of the United States in the free exercise and enjoyment by them, respectively, of certain rights and privileges secured to them as such citizens by the Constitution and laws of the United States; that is to say, the rights and privileges aforesaid which said unlawful and felonious conspiracy, combination, confederation, and agreement then and there was one for injuring, oppressing, threatening, and intimidating said citizens of the United States in the free exercise and enjoyment of said rights and privileges by unlawfully and with force and arms driving and conveying said citizens in a body from their said places of residence in said State of Arizona to and into another State, to wit, New Mexico, deporting said citizens from said State of Arizona to said State of New Mexico, and threatening said citizens with great bodily harm and death if they should return or endeavor to return to said State of Arizona.

Overt acts.

7 And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in and for executing the unlawful and felonious conspiracy, combination, confederation, and agreement aforesaid, certain of said defendants, at the several times and places in that behalf hereinafter mentioned in connection with their names, did do certain acts; that is to say:

1. Said Harry C. Wheeler, John C. Greenway, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Philip Tovrea, Reuben A. Clampitt, Nelson C. Bledsoe, Joseph P. Hodgson, and G. H. Dowell, on July 11, 1917, at Bisbee, in said county of Cochise and in said State and district of Arizona, attended a meeting at which were discussed the matter and method of forcibly deporting said citizens and the place to which they should be deported.

2. Said Harry C. Wheeler, on July 11, 1917, at Bisbee aforesaid, directed said G. H. Dowell to secure from the El Paso and Southwestern Railroad Company a railroad train for the use of said defendants in forcibly deporting said citizens.

3. Said H. H. Stout and Robert Rae, on July 12, 1917, at Douglas, in said county, State, and district, directed the manager of the Western Union Telegraph Company there to refuse to transmit that day all telegrams concerning the fact of the intended forcible deportation of said citizens.

4. Said H. H. Stout, on July 12, 1917, at Douglas aforesaid, by telephone, directed the exchange manager of said telephone and telegraph company at Bisbee aforesaid to refuse to permit any telephone communication that day between Bisbee and other points.

5. Said H. H. Stout, on July 12, 1917, at Douglas aforesaid, directed the exchange manager of the Mountain States Telephone and Telegraph Company there to refuse to permit any tele-
8 phone communication that day between Douglas and other points.

6. Said Harry C. Wheeler, on July 12, 1917, at Bisbee aforesaid, procured a machine gun for the use of said defendants in forcibly deporting said citizens.

7. Said Harry C. Wheeler, John C. Greenway, George B. Wilcox, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, and G. H. Dowell, on July 12, 1917, at Bisbee aforesaid, and at Lowell and Warren, in said county, State, and district, provided themselves with firearms, assisted in forcibly seizing said citizens and in collecting them in a baseball park, in forcibly driving said citizens from said park to said railroad train, and in transporting said citizens in said railroad train, under armed guards, to Columbus, in the State of New Mexico.

Conclusion.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said defendants, continuously throughout the period of time at the place and in manner and form aforesaid, unlawfully and feloniously did conspire, combine, confederate, and agree together to injure, oppress, threaten, and intimidate citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, and certain of said defendants did do acts to effect the object of the conspiracy, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

9 Second count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that before and on said twelfth day of July, in the year nineteen hundred and seventeen, Rudolph Babor, C. B. Briscoe, L. F. Burgert, Mike A. Conrad, Phil Courtney, Jack Crowl, George Forrester, Brik Hallin, Frank Hester, Robert R. Jones, William S. Keate, Edward Klausner, Dan Krich, Charles G. Loydahl, Emile Maumus, George J. Murphy Russell Pence, George T. Phillips, Carl L. Pyeatt, Joe Reddy, Jack Ringo, Fred M. Turnboo, Charles Wagner, Ben K. Webb, and R. F. Wright were citizens of the United States residing in said county of Cochise, in the State and in said district of Arizona, in the peace of said county, State, and district,

but not citizens of said State, and then and there, as such citizens of the United States, were exercising the right and privilege pertaining to citizens of other States of the United States other than said State of Arizona peaceably there to reside and remain, and to enjoy the blessings of liberty, and the right and privilege of being immune from unlawful deportation from that State to another State; and then and there were not persons charged in any State with treason, felony, or other crime, who had fled from justice of such State and been found in said State of Arizona, or persons found in said State of Arizona who had committed crimes or offenses against the United States in another State or in other States, or persons under sentence of imprisonment in a prison or prisons located in another State or in other States, or persons subject to extradition to a foreign country or foreign countries; and that the particulars of the citizenship in other States than said State of Arizona, of the citizens in this count of this indictment named, are to said grand jurors unknown.

10 And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the defendants named in the first count of this indictment, continuously and at all times throughout the period of time from the first to and including said twelfth day of July, in the year last aforesaid, at and within said county of Cochise, and in said district of Arizona, well knowing all the premises in this count of this indictment aforesaid, unlawfully and feloniously did conspire, combine, confederate, and agree together, and with divers other persons to said grand jurors unknown, to injure, oppress, threaten, and intimidate the citizens in this count named in the free exercise and enjoyment by them respectively of certain rights and privileges secured to them, as such citizens, by the Constitution and laws of the United States, that is to say, the rights and privileges in this count aforesaid; which said unlawful and felonious conspiracy, combination, confederation, and agreement in this count mentioned then and there was one for injuring, oppressing, threatening, and intimidating said last-mentioned citizens in the free exercise and enjoyment of said last-mentioned rights and privileges by unlawfully and with force and arms driving and conveying said citizens in a body, from their said places of residence in said State of Arizona, to and into another State, to wit, New Mexico, and threatening said citizens with great bodily harm and with death if they should return or endeavor to return to said State of Arizona.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in and for executing the unlawful and felonious conspiracy, combination, confederation, and agreement in this count of this indictment described, certain of said defendants, at the several times and places in that behalf mentioned under the

11 heading "Overt acts" in the first count of this indictment, did do certain acts, that is to say, the several acts mentioned in said first count, under said heading, in connection with their names; the allegations of which said acts in said first count are incorporated

in this count by reference to said first count as fully as if they were here repeated:

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Third count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that before and on said twelfth day of July, in the year nineteen hundred and seventeen, S. Y. Abercrombie, Joe Absetz, R. F. Aldridge, Chris Allen, Francisco Arvizu, John Babor, Chris Baker, W. M. Barney, Nels Bendixen, Henry Berger, W. A. Bevan, Frank Birmingham, William Blackburn, J. B. Borroum, Sam Brooks, Ernest Brown, Fred W. Brown, Charley Brown, David Burns, J. B. Campbell, Pete Caretto, Gust Carlson, Charles Carroll, Virgil B. Carter, James Casey, Loyd W. Chapin, J. P. Chase, W. A. Cook, William B. Cleary, F. L. Crawford, A. E. Crawford, Forest Creager, Ed Critchey, Arthur Dannie, C. H. Davis, Nick Delaney, Alfred M. Deming, Charley Dimmitt, Richard Denning, R. A. Dorane, S. C. Dorey, Phil Douglas, H. A. Earnest, J. W. Eastburn, Chas. E. Ellenwood, Frank Elliott, L. Ellis, Thomas N. English, Leo Eutner, Pierre Ewert, William Favor, Thomas Gibbons, Thomas G. Green, Oscar H. Green, Charles W. Grupe, Tim Hadsall, Harry Handly, Felix Hanhila, G. B. Harmon, J. F. Harrington, Joseph Harrington, Walter Harrington, Peter L. Harrington, Wyatt Harris, Ralph Hart, Harry D. Hartwick, Robert M. Heath, John Heikkila, A. G. Hendrick, Fred Hofheins, Michael E. Hogan, James Hogan, Harry Hogan, J. F. Holman, Harry Howard, J. K.
12 Huber, John Hunt, Harvey S. James, Edward J. Johnson, O. W. Johnson, Roy O. Johnson, Joseph L. King, Ben Koenigs, Anton Krall, Fred Lagori, Richard Langdon, W. Skochelich Lawrence, C. W. Leitz, Albert Lindkvist, W. H. Lithgow, Clifford Lynn, T. H. Loftus, Ysidro Y. Lopez, John Lyng, J. P. Magner, Oscar E. Malin, Richard Manner, Coronado Martinez, Gust Mattson, Eli May, Scott Melville, Leon E. Metz, Bernard Meyers, Charley McGourty, J. D. McCoy, J. C. McCutcheon, J. T. McDaniel, James McGaffegan, D. E. McIntosh, F. A. Morgan, Fred Moss, William C. Moodie, F. S. Moore, William F. Mowatt, John E. Murphy, Dee Carroll Nations, E. M. Neal, Peter Nestley, R. G. Nobbe, Jack F. Norman, W. M. Norris, T. J. O'Brien, Frank O'Conner, John J. O'Donnell, W. E. Oxley, Victor Pajunen, Walter Parker, Jack Parks, Robert E. Pastors, Roy Patton, William H. Persing, Louis Peterson, C. B. E. Phillips Alfonse Phillips, J. L. Phillips, L. E. Pollard, Peter Powell, Pite Prlia, Ramon Quiroz, J. L. Ramsey, Ben Reep, James Reilly, W. V. Reinschmidt, John Ribinski, Harry Richards, M. J. Roche, William R. Rogers, Gottlieb Schmidt, Markus Schutte, Felix Segulja, Gus Selin, L. C. Sharp, Mike Simmons, George Henry Sims, Frank Elmer Smith, Eugene Smith, J. S.

Smith, Matt K. Soori, Griffen Hiram Stollings, Jesse L. Stollings, Stanly Stonis, George Stretch, Anton Stukel, Charles E. Sullivan, John Sullivan, H. C. Sullivan, S. Summers, N. S. Sweet, Stephen Swetish, Rudolph Swetish, Charles E. Tannehill, E. B. Taylor, F. G. Taylor, Henry Thomas, Clint Thomas, Bradly Thompson, Walter E. Varnes, John Veale, George Vucurevich, R. A. Waddill, R. W. Webb, Charles C. Weiss, G. W. Wercinski, H. K. West, Frank Wheeler, George White, H. F. Whitman, Ed Williams, W. J. B. Wilson, C. F. Wilson, J. S. Wofford, Charles Wohlschlegel, Roger Wolfe, Orville Wright, Oscar Wylund, Robert Young, and Nick Zoro were citizens of the United States and of the State of Arizona, residing in the county of Cochise, in said State and
13 in said district of Arizona, in the peace of said county, State, and district, and then and there, as such citizens, were exercising the right and privilege pertaining to the citizens of said State peaceably there to reside and remain, and to enjoy the blessings of liberty, rather than in another State of the United States, and the right and privilege pertaining to the citizens of said State to be immune from unlawful deportation from that State to another State; and then and there were not persons charged in any State with treason, felony, or other crime, who had fled from justice of such State and been found in said State of Arizona, or persons found in said State of Arizona who had committed crimes or offenses against the United States in another State or in other States, or persons under sentence of imprisonment in a prison or prisons located in another State or in other States, or persons subject to extradition to a foreign country or foreign countries.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the defendants named in the first count of this indictment, well knowing all the premises in this count aforesaid, continuously and at all times throughout the period of time from the first to and including said twelfth day of July, in the year aforesaid, at and within said county of Cochise, and in said district of Arizona, unlawfully and feloniously did conspire, combine, confederate, and agree together, and with divers other persons to said grand jurors unknown, to injure, oppress, threaten, and intimidate the citizens in this count named in the free exercise and enjoyment by them respectively of certain rights and privileges secured to them, as such citizens, by the Constitution and laws of the United States, that is to say, the rights and privileges in this count aforesaid;
14 which said unlawful and felonious conspiracy, combination, confederation, and agreement in this count mentioned then and there was one for injuring, oppressing, threatening, and intimidating said last-mentioned citizens in the free exercise and enjoyment of their said rights and privileges by unlawfully and with force and arms driving and conveying said citizens in a body, from their said places of residence in said State of Arizona, to and into another State, to wit, New Mexico, deporting said citizens from said

State of Arizona to said State of New Mexico, and threatening them with great bodily harm and death if they should return or endeavor to return to said State of Arizona.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in and for executing the unlawful and felonious conspiracy, combination, confederation, and agreement in this count of this indictment described, certain of said defendants, at the several times and places in that behalf mentioned in connection with their names in the first count of this indictment under the heading, "Overt acts," did do the acts there described; the allegations of which said first count in that behalf are incorporated into this count by reference to said first count as fully as if they were here repeated:

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Fourth count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that before and on the twelfth day of July, in the year nineteen hundred and seventeen, Francisco Arvizu, W. M. Barney, William Blackburn, J. B. Borroum, Sam Brooks, Charley Brown, Fred W. Brown, Ernest Brown, David Burns, Virgil
15 B. Carter, Loyd W. Chapin, W. A. Cook, Arthur Dannie, Richard Denning, Frank Elliott, L. Ellis, Thomas G. Green, Oscar H. Green, Tim. Hadsall, Felix Hanhila, Wyatt Harris, Harry D. Hartwick, Ralph Hart, Robert M. Heath, J. F. Holman, Harvey S. James, Ben Koenigs, Anton Krall, Richard Langdon, C. W. Leits, W. H. Lithgow, Ysidro Y. Lopez, John Lyng, D. E. McIntosh, Eli May, Wm. C. Moodie, F. A. Morgan, Fred Moss, John E. Murphy, Dee Carroll Nations, W. E. Oxley, Louis Peterson, Pite Prlia, Ben Reep, Gottlieb Schmidt, Felix Segulja, S. Summers, N. S. Sweet, Rudolph Swetish, E. B. Talyor, Clint Thomas, Henry Thomas, Bradley Thompson, Walter E. Varnes, John Veale, George Vucurevich, George White, J. S. Wofford, Orville Wright, and Nick Zoro were citizens of the United States and of the State of Arizona residing in the county of Cochise, in said State and in said district of Arizona, and were respectively male persons between the ages of twenty-one and thirty, to wit, male persons who, on June 5, 1917, had respectively attained their twenty-first birthday and who did not on that day attain and had not before then attained their thirty-first birthday, and who were then and there required by the proclamation of the President of the United States dated May 18, 1917, to present themselves, and on said June 5, 1917, did present themselves, for and submit to registration, under the provisions of the act of Congress approved May 18, 1917, and entitled "An act to authorize the President to increase temporarily the military establishment of the United States," at divers registration places in divers precincts in said county to said grand jurors unknown, between 7 a. m. and 9 p. m. on said June 5, 1917, those precincts then

being the precincts wherein the citizens mentioned in this count of this indictment had their permanent homes and actual places of legal residence on that day, from which they were not then
16 temporarily absent (said citizens then and there not being officers or enlisted men of the Regular Army, of the Navy, of the Marine Corps, or of the National Guard or Naval Militia in the service of the United States, or officers of the Reserve Corps or enlisted men in the Enlisted Reserve Corps in active service); and, on said twelfth day of July, in the year aforesaid, said citizens in this count of this indictment named, not having then been called into the military service of the United States by operation of said act of May 18, 1917, were then and there, as such citizens, exercising the right and privilege pertaining to citizens who had presented themselves for, and who had submitted to registration as aforesaid, of remaining unmolested at their said permanent homes and actual places of legal residence, subject to draft, and until drafted, under the provisions of said act of May 18, 1917, into the military service of the United States, rather than being required by force other than their own wills to depart from their said homes and residences and go to another State of the United States and to parts to them unknown, where they would be required by such force to remain, under threats of great bodily harm and of death, if they should return to their said homes and residences

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that continuously and at all times throughout the period of time from the first to and including said twelfth day of July, in the year aforesaid, at and within said county of Cochise, in said district of Arizona, the defendants named in the first count of this indictment, well knowing all the premises aforesaid, and well knowing the fact to be, as the grand jurors aforesaid, upon their oath aforesaid, charge it was, that none of said citizens in this count named was a person charged in any State with treason, felony,
17 or other crime, who had fled from justice of such State and been found in said State of Arizona, or persons found in said State of Arizona who had committed crimes or offenses against the United States in another State or in other States, or persons under sentence of imprisonment in a prison or prisons located in another State or in other States, or persons subject to extradition to a foreign country or foreign countries, unlawfully and feloniously did conspire, combine, confederate, and agree together, and with divers other persons to said grand jurors unknown, to injure, oppress, threaten, and intimidate said last-mentioned citizens in the free exercise and enjoyment by them respectively of a certain right and privilege secured to them, as such citizens, by the Constitution and laws of the United States, that is to say, the right and privilege in this count aforesaid; which said unlawful and felonious conspiracy, combination, confederation, and agreement in this count mentioned then and there was one for injuring, oppressing, threatening, and intimidating said last-named citizens in the free exercise and enjoy-

ment of said last-mentioned right and privilege by unlawfully and with force and arms driving and conveying said citizens in a body, from their said homes and residences in said county and State, to and into another State, to wit, New Mexico, deporting said citizens from said State of Arizona to said State of New Mexico, and threatening said citizens with great bodily harm and with death if they should return or endeavor to return to their said homes and residences in said county, in said State of Arizona.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in and for executing the unlawful and
18 felonious conspiracy, combination, confederation, and agreement in this count of this indictment described, certain of said defendants, at the several times and places in that behalf mentioned under the heading "Overt acts" in the first count of this indictment, did do certain acts, that is to say, the several acts mentioned in said first count, under said heading, in connection with their names; the allegations of which said acts in said first count are incorporated in this count by reference to said first count as fully as if they were here repeated:

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and pro-

THOMAS A. FLYNN,
United States Attorney.
WILLIAM C. FITTS,
Assistant Attorney General.
OLIVER E. PAGAN,
Attorney, Department of Justice.

19 Endorsements. C-692 Tucson. In the United States District Court for the District of Arizona. United States of America vs. Harry C. Wheeler, John C. Greenway, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout. Indictment. A true bill. R. K. Shelton, foreman of the grand jury. Witnesses examined before the grand jury: William Neunhoffer, George E. Kellogg, Anna Bryan Cutting, Arthur A. Sundin, F. A. Young, M. Z. Tillotson, Charles Francis, Thomas N. English, Fred W. Brown, F. B. King, Edward Massey, A. S. Embree, Howard Sterling, James F. McDonald, Lon R. Bailey, Frank E. Thomas, Charles H. Bentley Walter E. Hawthorne, Blazo Damjanovich, Risto Tabakovich, William Favor, Abraham L. Hawley. Presented to the court in the presence of the grand jury by their foreman, and filed this 11th day of May, A. D. 1918. Mose Drachman, clerk.

20 In the United States District Court for the District of Arizona. Minute entry made on May 28th, 1918. Honorable William H. Sawtelle, district judge, presiding.

UNITED STATES OF AMERICA *vs.* GEORGE B. WILCOX, WALTER DOUGLAS, ROBERT Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants.	Docket No. C–692. Tucson.

The United States attorney, Thomas A. Flynn, being present, comes now each and all of the above named defendants, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, by their attorney, E. E. Ellinwood, esquire, and upon being arraigned at the bar of this court upon the indictment herein, the reading of said indictment being waived, each and all of said above named defendants, through counsel, demur to the said indictment herein, as set forth in the demurrer on file as of this date, and it is ordered by the court that the matter be passed until sometime in July, this year, a date to be hereinafter fixed by the court.

21 In the District Court of the United States for the District of Arizona.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* HARRY C. WHEELER, JOHN C. GREENWAY, GEORGE B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants.	C–692. Demurrer.

Demurrer to first count.

And the said defendants, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham,

James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell and H. H. Stout, by E. E. Ellinwood, John Mason Ross, and Cliton Mathews, their attorneys, come into court here, and, after hearing the said indictment read, say that the first count of the said indictment and the matters and things in the said first count contained are, as in the said first count alleged and set forth, not sufficient in law to compel them, the said defendants, to answer thereto, and this they are ready to verify.

22 Wherefore the said defendants pray judgment, and that by said court they may be dismissed and discharged of the said first count of the said indictment.

Demurrer to second count.

And the said defendant, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgras, G. H. Dowell and H. H. Stout, by E. E. Ellinwood, John Mason Ross and Clifton Mathews, their attorneys, come into court here, and, after hearing the said indictment read, say that the second count of the said indictment and the matters and things in the said second count contained are, as in the said second count alleged and set forth, not sufficient in law to compel them, the said defendants, to answer thereto, and this they are ready to verify.

Wherefore the said defendants pray judgment, and that by said court they may be dismissed and discharged of the said second count of the said indictment.

Demurrer to third count.

And the said defendants, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, by E. E. Ellinwood, John Mason Ross, and Clifton Mathews, their attorneys, come into court here, and, after hearing the said indictment read, say that the third count of the said indictment and the matters and things in the said third count contained are, as in the said their count alleged and set forth, not sufficient in law to

23 compel them, the said defendants, to answer thereto, and this they are ready to verify.

Wherefore the said defendants pray judgment, and that by said court they may be dismissed and discharged of the said third count of the said indictment.

Demurrer to fourth count.

And the said defendants, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell and H. H. Stout, by E. E. Ellinwood, John Mason Ross and Clifton Mathews, their attorneys, come into court here, and, after hearing the said indictment read, say that the fourth count of the said indictment and the matters and things in the said fourth count contained are, as in the said fourth count alleged and set forth, not sufficient in law to compel them, the said defendants, to answer thereto, and this they are ready to verify.

Wherefore the said defendants pray judgment, and that by said court they may be dismissed and discharged of the said fourth count of the said indictment.

E. E. Ellinwood,
John Mason Ross,
and Clifton Mathews,
Attorneys for the said defendants, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allizon, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout.

24 Endorsements: C-692. In the District Court of the United States for the District of Arizona. United States of America, plaintiff, vs. Harry C. Wheller, John C. Greenway, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants. Demurrer. Filed May 28, 1918. Mose Drachman, clerk.

25 **In the District Court of the United States for the District of Arizona.**

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* HARRY C. WHEELER, JOHN C. GREENWAY, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants.	C-692. Demurrer of Defendant Harry C. Wheeler.

Demurrer to first count.

And the said defendant, Harry C. Wheeler, by E. E. Ellinwood, John Mason Ross, and Clifton Mathews, his attorneys, comes into court here, and, after hearing the said indictment read, says that the first count of the said indictment and the matters and things in the said first count contained are, as in the said first count alleged and set forth, not sufficient in law to compel him, the said defendant, to answer thereto, and this he is ready to verify.

Wherefore, the said defendant prays judgment, and that by said court he may be dismissed and discharged of the said first count of the said indictment.

Demurrer to second count.

And the said defendant, Harry C. Wheeler, by E. E. Ellinwood, John Mason Ross, and Clifton Mathews, his attorneys, comes into court here, and, after hearing the said indictment read, says
26 that the second count of the said indictment and the matters and things in the said second count contained are, as in the said second count alleged and set forth, not sufficient in law to compel him, the said defendant, to answer thereto, and this he is ready to verify.

Wherefore the said defendant prays judgment, and that by said court he may be dismissed and discharged of the said second count of the said indictment.

Demurrer to third count.

And the said defendant, Harry C. Wheeler, by E. E. Ellinwood, John Mason Ross, and Clifton Mathews, his attorneys, comes into court here, and, after hearing the said indictment read, says that the third count of the said indictment and the matters and things

in the said third count contained are, as in the said third count alleged and set forth, not sufficient in law to compel him, the said defendant, to answer thereto, and this he is ready to verify.

Wherefore the said defendant prays judgment, and that by said court he may be dismissed and discharged of the said third count of the said indictment.

Demurrer to fourth count.

And the said defendant, Harry C. Wheeler, by E. E. Ellinwood, John Mason Ross, and Clifton Mathews, his attorneys, comes into court here, and, after hearing the said indictment read, says that the fourth count of the said indictment and the matters and things in the said fourth count contained are, as in the said fourth count alleged and set forth, not sufficient in law to compel him, the said defendant, to answer thereto, and this he is ready to verify.

Wherefore the said defendant prays judgment, and that by said court he may be dismissed and discharged of the said fourth count of the said indictment.

ELLINWOOD & ROSS,
and CLIFTON MATHEWS,
Attorneys for the said defendant, Harry C. Wheeler.

27 Endorsements: C–692. In the District Court of the United States for the District of Arizona. United States of America, plaintiff, vs. Harry C. Wheeler et al., defendants. Demurrer of Defendant Harry C. Wheeler, filed Oct. 21, 1918. Mose Drachman, clerk.

28 In the United States District Court for the District of Arizona. Minute entry made on October 21st, 1918. Honorable W. W. Morrow, circuit judge, presiding.

UNITED STATES OF AMERICA *vs.* HARRY C. WHEELER, JOHN C. GREENWAY, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Trovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants.	Docket No. C–692. Tucson.

This matter came on this day for hearing upon defendant's demurrer to the indictment herein, Thomas A. Flynn, United States attorney, and Wm. C. Fitts, special assistant to Attorney General, appearing on behalf of the United States, and Clifton Mathews, of firm of Ellinwood & Ross, appearing on behalf of the defendants

named in the demurrer on file herein, and said demurrer was argued in part, the defendants having in open court waived arraignment and appeared by counsel on the said demurrers. The time for adjournment having arrived and this matter not having been completed, the court was adjourned and the matter continued until Tuesday, the 22nd day of October, A. D. 1918, at ten o'clock a. m.

29 In the United States District Court for the District of Arizona. Minute entry made on October 22nd, 1918. Honorable W. W. Morrow, Circuit Judge, Presiding.

UNITED STATES OF AMERICA *vs.* HARRY C. WHEELER, JOHN C. GREENWAY, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants.	Docket No. C-692. Tucson.

The argument of defendants' demurrer herein having been continued from a previous session of this court, comes now all the parties hereto and said argument is continued and completed and submitted to the court and thereupon the court takes the same under advisement.

30 In the United States District Court for the District of Arizona. Minute entry made on December 2nd, 1918. Honorable William H. Sawtelle, district judge, presiding.

UNITED STATES OF AMERICA *vs.* HARRY C. WHEELER, JOHN C. GREENWAY, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants.	Docket No. C-692. Tucson.

This case having been duly heard on the 21st day of October, A. D. 1918, and submitted to the court, Honorable W. W. Morrow, circuit

judge, presiding, and was by said judge taken under advisement, now on this 2nd day of December, A. D. 1918, it is by the court ordered, adjudged, and decreed, that the demurrer to the indictment and to each and every count thereof, be, and the same is hereby, sustained and the indictment ordered quashed, to which ruling of the court the United States attorney, Thomas A. Flynn, on behalf of the United States, then and there in open court duly excepted and in open court gave notice of appeal to the Supreme Court of the United States, and it is ordered that thirty days be given the said United States within which to prepare and tender its bill of exceptions and record on appeal.

31 In the District Court of the United States for the District of Arizona.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* HARRY C. WHEELER, JOHN C. GREENWAY, GEORGE B. WILCOX, WALTER DOUGLAS, ROBERT RAE, MILES MERRILL, GERALD SHERMAN, MICHAEL J. CUNNINGHAM, JAMES ALLISON, BASSETT T. WATKINS, LEMUEL C. SHATTUCK, MICHAEL J. BROPHY, PHILIP TORREA, WILLIAM H. BROPHY, REUBEN A. CLAMPITT, CHARLES H. HUNT, JAMES L. GANNON, VANCE M. JOHNSON, NELSON C. BLEDSOE, JOSEPH P. HODGSON, ALVAN W. HOWE, WILLIAM P. SIMS, HASCAL SNODGRASS, G. H. DOWELL, and H. H. STOUT, defendants.	No. C-692.

Indictment charging the defendants with a conspiracy in violation of section 19 of the Criminal Code of the United States of America 4, 1909 (33 Stat. 1088, 1092), (section 6, act of May 31, 1870, 16 Stat. 141; R. S. section 5508).

WILLIAM C. FITTS,
Special Assistant to the Attorney General.
THOMAS A. FLYNN,
United States Attorney,
Attorneys for the United States.
E. E. ELLINWOOD,
JOHN MASON ROSS,
and CLIFTON MATHEWS,
Attorneys for the defendants, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Torrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout.

32 Morrow, *Circuit Judge:*

This is a demurrer to an indictment charging the defendants with a conspiracy in violation of section 19 of the Criminal Code of the United States.

The objection is that the facts stated in the indictment do not charge an offense within the constitutional provisions of that section.

The section provides as follows:

"Sec. 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The section was originally contained in section 6 of "An act to enforce the right of citizens of the United States to vote in the several States of the Union and for other purposes," approved May 31, 1870 (16 Stat. 140–141). It was afterwards contained in the Revised Statutes of the United States enacted June 22, 1874, as section 5508 in chapter seven, entitled "Crimes against the elective franchise and civil rights of citizens." The section is now contained in chapter three of the Criminal Code bearing the same title as chapter seven containing section 5508 in the Revised Statutes did prior to the enactment of the Criminal Code.

This case is known to the public as the "Bisbee deportation case." It involves an alleged conspiracy on the part of the defendants continuing from the first to and including the twelfth day of July, 1917, to deport from Bisbee, in the State of Arizona, two hundred
33 and twenty-one persons to the State of New Mexico. The conspiracy was plainly a single act on the part of the defendants against all the persons to be deported, but for the purpose of classifying such persons with respect to their citizenship and liability to the selective draft, the indictment has been split up into four counts so as to charge the offense as a conspiracy directed against different classes of persons. This may be done subject to certain limitations. (United States v. Howell, 65 Fed. 402; Orth v. United States, 252 Fed. 568.) These four counts classify the persons against whom the conspiracy was directed as follows:

In the first count the whole number of two hundred and twenty-one persons are described as citizens of the United States.

In the second count twenty-five of this number of persons are described as citizens of the United States residing in but not citizens of the State of Arizona.

In the third count one hundred and ninety-six of the persons mentioned in the first count are described as citizens of the United

States and of the State of Arizona, residing in Arizona. There is also in this count a name not mentioned in the first count, making the number in this class one hundred and ninety-seven. No objection is made to the indictment on this account.

In the fourth count sixty persons mentioned in the first count are described as citizens of the United States and of the State of Arizona, residing in said State, who were male persons between the ages of twenty-one and thirty, required by the proclamation of the President of the United States, dated May 18th, 1917, to present themselves on June 5th, 1917, and who did present themselves for and submit to registration under the provisions of the act of Congress approved May 18th, 1917.

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It is alleged in the first count that the two hundred and twenty-one persons against whom the conspiracy of the defendants was directed "were citizens of the United States, residing in the county of Cochise, in the State and in said district of Arizona, in the peace of said county, State, and district, and then and there as such citizens of the United States were exercising the right and privilege pertaining to citizens of said State peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another State of the United States, and the right and privilege pertaining to citizens of said State to be immune from unlawful deportation from that State to another State; and then and there were not persons charged in any State with treason, felony, or other crime, who had fled from justice of said State and had been found in said State of Arizona, or persons then in said State of Arizona who had committed crimes or offenses against the United States in another State, or in other States, or persons not sentenced or imprisoned in a prison or prisons located in another State or any other States or persons subject to extradition to a foreign country or foreign countries."

It is charged that the defendants conspired and confederated together "to injure, oppress, threaten, and intimidate said citizens of the United States in the free exercise and enjoyment by them respectively of certain rights and privileges secured to them as such citizens by the Constitution and laws of the United States; that is to say, the rights and privileges aforesaid." The rights and privileges "aforesaid" were the "right and privilege pertaining to citizens of the said State peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another State of the United States and the right and privilege pertaining to citizens of said State to be immune from unlawful deportation from that State to another State." It is further charged that "said unlawful and felonious conspiracy, combination, confederation, and agreement then and there was one for injuring, oppressing, threatening, and intimidating said citizens of the United States in the free exercise and enjoyment of said rights and privi-

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leges by unlawfully and with force and arms driving and conveying said citizens in a body from their said places of residence in said State of Arizona to an' into another State, to wit, New Mexico, and threatening said citizens with great bodily harm and death if they should return or endeavor to return to said State of Arizona."

It is further charged that certain of the defendants in and for executing such conspiracy did certain over' acts set forth in the count.

The second count is the same as the first count, except that it is alleged that the twenty-five persons against whom the conspiracy was directed are described as citizens of the United States residing in but not citizens of the State of Arizona who "were exercising the right and privilege pertaining to citizens of other States of the United States other than said State of Arizona, peaceably there to reside and remain and to enjoy the blessings of liberty and the right and privilege of being immune from unlawful deportation from that State to another State." The charge in this count is that
36 the defendants conspired and confederated together "to injure, oppress, threaten, and intimidate the citizens in this count named in the free exercise and enjoyment by them, respectively, of certain rights and privileges, secured to them as such citizens by the Constitution and laws of the United States, that is to say, the rights and privileges in this count aforesaid." The rights and privileges "in this count aforesaid" are the rights and privileges "pertaining to citizens of other States of the United States other than said State of Arizona peaceably there to reside and remain and enjoy the blessings of liberty and the right and privilege of being immune from unlawful deportation from that State to another State."

The third count is the same as the first count, except that it is alleged that the one hundred and ninety-seven persons therein named, against whom the conspiracy of the defendants was directed, were citizens of the United States and of the State of Arizona.

The fourth count is substantially the same as the first count, except that it is alleged that the sixty persons against whom the conspiracy was directed are described as "citizens of the United States and of the State of Arizona residing in the county of Cochise, in said State, and in said district of Arizona, and were, respectively, male persons between the ages of 21 and 30, * * * who 'ere then and there required by the proclamation of the President of the United States, dated May 18, 1917, to present themselves, and did present themselves for and submit to registration under the provisions of the act of Congress approved May 18, 1917, * * * at divers registration places in divers precincts, * * * these precincts being the precincts where the citizens mentioned in this count of this indictment had their permanent homes and actual places of legal residence." Against these persons so subject to the selective draft it is charged

that the defendants conspired "to injure, oppress, threaten, and intimidate in the free exercise and enjoyment by them, respectively, of the certain right and privilege secured to them as such citizens by the Constitution and laws of the United States, that is to say, the right and privilege in the count aforesaid. The right and
37 privilege in the count aforesaid was "the right and privilege pertaining to citizens who had presented themselves for, and who had submitted to registration as aforesaid, of remaining unmolested in their said permanent homes and actual places of legal residence subject to draft and until drafted under the provisions of said act of May 18, 1917, into the military service of the United States."

The act did not require registrants under the act to remain in their permanent homes and actual places of legal residence until drafted unto the military service of the United States, nor did the selective service regulations prescribed by the President of the United States make such a requirement, but, on the contrary, the location of the registrant elsewhere than at his permanent home and actual place of legal residence at the time of his call into the military service was provided for in such regulations and the absence from home of the registrant in no way prejudiced his rights under the act or under the regulations of the President.

Stripped of the verbiage required to state the various elements of the alleged conspiracy, we find that the injury charged in the four counts of the indictment may for the purpose of the present inquiry be reduced to the single charge of a conspiracy to injure, oppress, threaten, and intimidate certain citizens of the United States in the free exercise and enjoyment of the right and privilege pertaining to citizens of the State of Arizona, peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another State of the United States and the right and privilege pertaining to citizens of said State to be immune from unlawful deportation from that State to another State.

The offense which the defendants are charged to have conspired to commit is then an offense against the right and
38 privilege of the persons conspired against secured to them as citizens of the State of Arizona, and upon examining the law of that State we find that the charge in the indictment is correct in both form and substance and that protection has been provided for such persons under the police power of the State. Section 186 of the Penal Code of the State of Arizona provides:

"Every person who forcibly * * * takes * * * any person in this State and carries him into another * * * State * * * is guilty of kidnapping."

for which a punishment has been provided. Another aspect of the case is provided for in section 205 of the Penal Code, where it is enacted: "False imprisonment is the unlawful violation of the personal liberty of another," for which a punishment has been provided.

The right of protection furnished by this police power of the State is a right reserved to the State under the tenth amendment of the Constitution of the United States providing that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States, respectively, or to the people."

Whether this State protection is exclusive or not in a particular instance depends upon the question of whether the power has also been granted by the Constitution to the General Government expressly or by necessary implication.

Congress has provided a statute against kidnapping, to be found in sections 268, 269, 270, 271 of the Criminal Code (R. S., secs. 5525, 5526, 5527, and the act of June 23, 1874), but this legislation is expressly limited to the constitutional authority of Congress to legislate against slavery, involuntary servitude, and peonage under the thirteenth and fourteenth amendments to the Constitution. (The Peonage Cases, 123 Fed., 671; Clyatt vs. U. S., 197 U. S., 207.)

This amounts to a legislative declaration that kidnapping not so limited was left to be dealt with by the States under their police power. Expressio unis est exclusio alturis.

39 The question is broadly stated in the brief of the Assistant Attorney General in support of the indictment in this case as follows:

"We admit that the fundamental rights of a person as such or of a citizen as such are not secured to him by the Constitution of the United States. The rights to life, liberty, and the pursuit of happiness, for instance, existed before the Constitution, were not created by it, and hence are not secured by it, but by the constitution and laws of the several States. If, however, these fundamental rights are brought into connection with the Federal Government, the situation is changed and the right then becomes one secured by the Constitution of the United States."

He then proceeds to explain what he means by "fundamental rights" being "brought into connection with the Federal Government."

"For example," he says, "ordinarily the right to remain in any one place or to move freely from place to place is not secured by the Constitution of the United States, but if State boundaries are brought into the question, if the right claimed be to remain in one of the several States of the Federal Union as distinguished from another, or to move freely from one of the several States into another State of the Federal Union, it then becomes a right secured by the Constitution of the United States." Citing Crandall v. Nevada, 6 Wall., 35; U. S. v. Patrick, 54 Fed., 338–347.

In the case of Crandall v. Nevada, the question related to a capitation tax of $1.00 imposed by the statute of the State of Nevada "upon every person leaving the State by any railroad, stage-coach or other vehicle engaged or employed in the business of transporting passengers for hire." The supreme court of the State held that this tax was not

an impost on exports nor an interference with the power of Congress to "regulate commerce among the several States" and upheld the statute. The case was taken to the Supreme Court of the United States, where the question whether the tax was an impost on exports or was an interference with the powers of Congress to regulate commerce among the several States were passed over and the tax held to be the exercise of an authority by the State affecting the functions of the Federal Government and inconsistent with its constitutional operations. In support of this doctrine, the court refers to the extensive operations of the Federal Government conducted through its various departments with the citizens of the several States and the necessity that such communications should be free and open
40 without any obstruction on the part of any of the States and the court finds that the right of the State to impede or embarrass the constitutional operations of that Government or the rights which the citizens hold under it has been uniformly denied. The court quotes from the opinion of Chief Justice Marshall in the case of McCullough v. Maryland (4 Wheaton, 316), finding:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very means, is declared to be supreme over that which exerts the control, are propositions not to be denied. If the States may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of the Government. This was not intended by the American people. They did not design to make their Government dependent on the States."

Manifestly this finding of the Supreme Court that the State has no power to obstruct or burden the operations of the Federal Government, has no application to the facts alleged in the present indictment. The facts here stated do not relate to any act of the State and do not charge any intent or purpose on the part of the defendants to obstruct or burden the operations of the Federal Government or to obstruct or burden the transportation of passengers from one State to another. There is a recital in the indictment relating to the crossing of the State boundary by the persons against whom the conspiracy was directed. Treating this recital as a charge, it does not state any fact from which an inference may be drawn that it was the intent or purpose of the defendants to burden or in any way obstruct or interfere with the operations of the Government to obstruct, burden, or impede the transportation of passengers from one
41 State to another, or to prevent or obstruct the persons against whom the conspiracy is alleged to have been directed in moving freely from Arizona into any other State.

We do not see how the decision of the Supreme Court in Crandall v. Nevada can be held as decisive of the present case.

In the case of U. S. v. Patrick (54 Fed., 338), the defendants were indicated for conspiracy and murder under the first clause of sec. 5508 (sec. 19 of the Criminal Code) and sec. 5509 of the Revised Statutes.

The conspiracy charged against the defendants under sec. 5508 was to injure, oppress, threaten, and intimidate certain designated citizens of the United States in the free exercise and enjoyment of a right and privilege secured them by the Constitution and laws of the United States; three of these persons are described as deputy collectors of internal revenue of the United States and two as deputy marshals of the United States, and another as a person summoned as a "posse."

The particular right and privilege alleged to have been secured to these persons by the Constitution and laws of the United States, and in the free exercise and enjoyment of which the conspiracy was formed and prosecuted to injure, oppress, threaten, and intimidate, was the duty, right, and privilege on the part of the deputy collectors of internal revenue to make searches for and seizures of distilled spirits upon which the tax imposed by the laws of the United States had not been paid, and the duty on the part of the deputy marshals and of the person summoned as a "posse" to aid and assist in the search for and seizure of such distilled spirits, and the arrest of persons who might be discovered in the possession of such distilled spirits. All engaged in the performance of official duties for and on behalf of the Federal Government.

42 In support of the demurrer to the indictment in that case, it was contended that the statute had for its object the protection of citizens in the free exercise and enjoyment of the rights and privileges secured to them as citizens by the Constitution and not for the protection of officers of the United States engaged in the performance of duties as such. To this contention, Judge Jackson, afterwards a justice of the Supreme Court, replied:

"In respect to citizenship, and the rights and privileges incident thereto, it should be borne in mind that we have in the political system of this country, since the adoption of the fourteenth amendment to the Constitution, if such did not previously exist, both a national and State citizenship, corresponding with our dual form of government, State and Federal, which owes allegiance to and is subject to the jurisdiction and entitled to the protection of each government within the sphere of their respective sovereignties. 'The same person may be at the same time a citizen of the United States and a citizen of the State; but his rights of citizenship under one of these governments will be different from those he has under the other. The Government of the United States, although it is, within the scope of its powers, supreme, and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not

expressly or by implication placed under its jurisdiction. All that can not be so granted or secured are left to the exclusive protection of the States.' (U. S. v. Cruikshank, 92 U. S., 542.) Speaking generally, the Constitution and laws add nothing to the rights of one citizen as against another, nor do they aim to protect one citizen from personal injury or violence by another within the limits of a State. These are matters coming properly within the sovereignty and jurisdiction of the States. But in respect to rights and privileges derived from the United States or secured by their constitution, or laws and exercised by their authority, within the scope of their powers and the sphere of their jurisdiction the General Government may, under the legislation of Congress, protect its citizens. * * * The statute applies to any citizen in the exercise 'of any right or privilege secured to him by the Constitution or laws of the United States.' This language does not indicate or fairly imply that the right or privilege secured and exercised must be such right or privilege as is common to all citizens of the United States as such."

The case reviews the cases upon the question and referring to the fundamental rights which belong to any citizen as a member of society and who as such is protected by the State, quotes from
43 U. S. v. Cruikshank (92 U. S., 553-554), where the Supreme Court said:

"Sovereignty for this purpose rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State than it would be to punish for false imprisonment or murder itself."

The court concludes that sections 5508 and 5509 are confined to rights and privileges which are created or secured by the Constitution wherein depends the authority of Congress to legislate for the protection of its citizens and that such authority can never be allowed to extend to offenses affecting rights and privileges of citizens which exist by State authority independent of the Constitution and laws of the United States. The indictment was accordingly held sufficient in charging a conspiracy to injure, oppress, threaten, and intimidate citizens in the free exercise or enjoyment of the rights and privileges secured to them as agents or officers of the Government discharging functions conferred or exercising rights and privileges secured by its laws and for its benefit.

It is clear that this case does not support the present indictment. The persons against whom the conspiracy of the defendants is alleged to have been directed in this case were not officers of the Federal Government, nor were they exercising any authority under that Government. In the Patrick case, had the persons conspired against had no other claim to the protection of the United States than that of being citizens of the United States with the rights pertaining to the citizens of the State, as alleged in the present indictment, the indictment in that case would clearly have been

held insufficient for the reason as there stated that such protection would rest alone in the State.

We do not overlook Judge Jackson's reference to Baldwin vs. Franks on page 347, and his comment that "If the party affected or injured by the conspiracy had been a citizen it is clear that the offense charged would have been embraced by the provisions of said section," but this comment can not prevail against what we believe to be the plain meaning of the decision of the Supreme Court in Baldwin vs. Franks, as we shall show when we reach that case in this review.

44 To repeat: "It is no more the duty or in the power of the United States to punish for a conspiracy to falsely imprison or murder in a State than it would be to punish for false imprisonment or murder itself."

The attorney for the United States cites the case of U. S. vs. Waddell (112 U. S. 76), holding that the exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied land and to reside thereon and be protected from personal violence with respect to such residence is the exercise of a right secured by the Constitution and laws of the United States, and by analogy that such authority secures to a citizen the right to be and remain in a particular place under the protection of the Federal Government against violence on account of such residence. The decision of the court carefully excludes that construction of the statute. The court says:

"The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the State and by its courts. But it is something different from that. It is the right to remain on the land in order to perform the requirements of the act of Congress, and, according to its rules, perfect his incipient title."

In U. S. v. Logan (144 U. S. 263–285), the defendants were charged under section 5508 (Sec. 19 of the Criminal Code) with a conspiracy to injure and oppress certain citizens of the United States who were in the custody of the Deputy United States marhsal under a lawful committment to answer the indictments in a Federal court for offenses against the laws of the United States. The charge was that the defendants conspired to injure and oppress the persons in the custody of the deputy United States marshal in the free exercise and enjoyment of the right to be protected from violence while in said custody. Upon this question the court said:

"The prisoners were in the exclusive custody and control of the United States, under the protection of the United States, and in the peace of the United States. There was a coextensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection and peace; and a corresponding right of those persons secured by the Constitution and laws

of the United States, to be so protected by the United States. If the officers of the United States charged with the performance
45 of the duty in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States."

The indictment was held sufficient, not because the persons conspired against were alleged to be citizens of the United States, but because it was charged that they were in the custody of the deputy United States marshal and in that relation they were entitled to the protection of the United States.

The case of In re Quarles (158 U. S. 532–536) was a conspiracy to injure, and oppress a citizen of the United States in the free exercise and enjoyment of the right and privilege to report to a deputy United States marshal that a person named had violated the internal revenue laws of the United States by carrying on the business of distilling without having given bond as required by law. The court held that "the right of the private citizen who assists in putting in motion the course of justice, and the right of the officers concerned in the administration of justice, stand upon the same ground just as do the rights of citizens voting and of officers elected."

The court quotes from the case of Ex Parte Yarbrough (110 U. S. 651–662), where the court said:

"The power in either case arises out of the circumstances that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both cases, it is the duty of that Government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the Government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice."

46 The right of the citizens of the United States to vote had reference to the act of May 31, 1870, to enforce the right of citizens of the United States to vote in the several States of the Union. Section 19 of the Criminal Code now under consideration was section 6 of that act and as there contained had reference to the right of a citizen of the United States to vote.

In Motes v. U. S. (178 U. S., 458–462), the conspiracy was of the same character as in the Quarles case, but the case involved other questions. So far as the right of the person conspired against to give information to an officer of the Government of the violation of the internal revenue laws, the court said:

"It was the right and privilege of" [the person conspired against] "in return for the protection enjoyed under the Constitution and

laws of the United States to aid in the execution of the laws of this country by giving information to the proper authorities of violation of its laws. That right and privilege may properly be said to be secured by the Constitution and laws of the United States, and it was competent for Congress to declare a conspiracy to injure, oppress, threaten, and intimidate a citizen because of the exercise by him of such right and privilege to be an offense against the United States."

It follows from this and other cases that might be cited, that the United States extends its jurisdiction and protection to its officers, agents, and employees against a conspiracy to injure, oppress, threaten, or intimidate them in the perfromance of their official duties. This jurisdiction and protection is also extended to citizens of the United States in the exercise of the right and privilege to freely pass from one State to another or to the seat of government at Washington, to persons residing upon and making homestead entries upon public lands, and to persons engaged in service under or in connection with the constitutional operations of the Government.

47 The United States also extends its jurisdiction and protection against any action of the State which impairs the constitutional privileges and immunities of citizens of the United States or which injures them in life, liberty, or property, without due process of law, or which denies to any of them the equal protection of the laws, secured to them by the fourteenth amendment. In U. S. v. Cruikshank (92 U. S., 542–554), the Supreme Court in discussing the subject said:

"The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. * * * The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guaranties, but no more. The power of the National Government is limited to the enforcement of this guaranty."

In U. S. v. Harris (106 U. S., 629–639) the court refers to the provisions of the fourteenth amendment in the following terms:

"The language of the amendment does not leave this subject in doubt When the States has been guilty of no violation of its pro-

visions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States: when no one of its departments has deprived any person of life, liberty, or property, without due process of law, nor denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

48 In the Civil Rights cases (109 U. S. 311-317) the court again discusses the subject, adding emphasis that it is a limitation upon the action of the State and does not deal with the invasion of the individual rights, the court says:

"It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. * * * In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force and may presumably be vindicated by resort to the laws of the State for redress."

The United States also extends its jurisdiction and protection against State action by one State discriminating against citizens of another State. Section 2 of Article 4 of the Constitution provides:

"Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The second count of the indictment seems to have had this constitutional provision in view when it charged that certain citizens of the United States residing in Arizona against whom the conspiracy was directed were exercising the rights pertaining to citizens of other States of the United States, but this provision of the Constitution does not apply to acts of individuals. It is a limitation upon the action of the State. (U. S. v. Harris, 106 U. S. 639, supra.)

49 See also Le Grand v. U. S. (12 Fed. 577). An opinion by Mr. Justice Woods, who wrote the opinion in the latter case while sitting as circuit justice in the Eastern District of Texas, and

who as a justice of the Supreme Court wrote the opinion in U. S. vs. Harris, supra. See also U. S. v. Morris (125 Fed. 322).

The prosecution on the oral argument relied very confidentially upon the case of Baldwin vs. Franks (120 U. S. 678, heretofore referred to, as supporting the sufficiency of the indictment in this case. As we understand that case, instead of supporting the sufficiency of this indictment, the opinion of the court points very clearly and distinctly to its insufficiency. The conspiracy of the defendants in that case was to drive and expel certain Chinese aliens from the town of Nicolaus, in the State of California, where they were engaged in legitimate business and labor to earn a living under and by virtue of the treaties existing between the Government of the United States and the Emperor of China. The treaty of November 17, 1880, referred to, provided that the United States was to exert all its power to devise measures for the protection of Chinese laborers and Chinese of any other class residing in the United States "and to secure to them the same rights, privileges, immunities, and exceptions as may be enjoyed by citizens or subjects of the most favored nations, and to which they are entitled by treaty." The Chinese persons against whom the conspiracy of the defendants in that case was directed appealed to the jurisdiction of the United States court for the punishment of the defendants under the provisions of the statute, which included the section of the Revised Statutes here in controversy.

50 The question arose: "Who are the citizens of the United States to which the statute referred?" This was a controlling question under the statute and a most important inquiry under the treaty, since the Chinese persons conspired against were entitled to appeal to the United States for the same protection as "enjoyed by the citizens or subjects of the most favored nations." The court after referring to a number of cases on the subject, says:

"The persons on whom the wrong to be punishable must be inflicted is described as 'citizens' * * * Sometimes used in popular language to indicate the same thing as resident, inhabitant, or person. That it is not so used in section 5508 in the Revised Statutes is quite clear, if we revert to the original statute from which this section was taken. That statute was the act of May 31, 1870, c. 114, 16 Stat., 140, 'to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes.' It is the statute which was under consideration as to some of its sections in United States vs. Reese, supra, and from its title, as well as its text, it is apparent that the great purpose of Congress in its enactment was to enforce the political rights of citizens of the United States in the several States. Under these circumstances there can not be a doubt that originally the word 'citizen' was used in its political sense, and as the Revised Statutes are but a revision

and consolidation of the statutes in force December 1, 1873, the presumption is that the word has the same meaning there that it had originally.

"This particular section is a substantial reenactment of section 6 of the original act, which is found among the sections that deal exclusively with the political rights of citizens, especially their right to vote, and were evidently intended to prevent discriminations in this particular against voters on account 'of race, color, or previous condition of servitude.' Sometimes, as in sections 3 and 4, the language is broader than this, and therefore, as decided in United States v. Reese, those sections are inoperative, but still it is everywhere apparent that Congress had it in mind to legislate for citizens, as citizens, and not as mere persons, residents, or inhabitants."

This opinion is a clear and distinct interpretation of the statute, declaring that it deals exclusively with the political rights of citizens especially establishing their right to vote and not with the rights of citizens as mere persons, residents, or inhabitants. In the more recent case of United States vs. Bathgate (246 U. S., 220),
51 the court reiterated its opinion that "Section 19 of the Criminal Code of course now has the same meaning as when enacted as section 6, act of May, 1870."

In the latter case, the court states as pertinent to the construction of this section the rule referred to by the Supreme Court in U. S. vs. Lacher (134 U. S., 624–628), where the court said:

"That there must be no constructive offenses and before a man can be punished his case must be plainly and unmistakably within the statute."

The attorneys for the United States contend that these cases, as here interpreted, do not determine the questions involved in this demurrer, for the reason that the conspiracy alleged in the indictment was to extend in its effect across the border of the State of Arizona into the State of New Mexico and involve interstate transportation, a subject over which the United States has jurisdiction and extends its protection in certain specified particulars, but this is not sufficient to bring into play the Federal jurisdiction punishing acts of the character described in the indictment. There must be a statute of the United States to that effect enacted by Congress pursuant to constitutional authority either express or clearly implied.

It is nowhere stated in this section or in the act in which it was originally passed or in the statutes as revised, that the right to be enforced was a right pertaining to interstate transportation. We have therefore no basis from which we can draw a clear or necessary implication that the facts stated in the indictment come within the constitutional scope of section 19.

52 Why has this prosecution been brought in the Federal court rather than in the State court, which has unquestioned jurisdiction of the offense charged? The Assistant Attorney General stated

on the oral argument that it might be because there was such bias and prejudice in the community where the offense was committed against the persons complaining of the offense that the law of the State could not be enforced against the defendants. This is not a legal or constitutional ground of Federal jurisdiction, although frequently urged as a ground of Federal legislation covering subjects where local authority is unequal to the task of administering equal and exact justice to all, but it is difficult to understand the explanation in this case, if the large body of persons against whom the conspiracy is charged to have been directed, were in fact bona fide citizens of the United States as claimed. Those that were citizens by naturalization proceedings were each required to prove to the satisfaction of the court by two witnesses at the time of naturalization that for five years prior thereto he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. Those that were native-born citi*zens* should certainly have possessed an equally good moral character; have been equally loyal to the Government of the United States, and equally attached to the principles of the Constitution of the United States, as those who had been naturalized. If this was the character of persons against whom the conspiracy was directed, we cannot understand why they could not submit their character and conduct
53 to a tribunal in the community where they resided in proceedings against others for an open violation of the State law. The situation is, indeed, a lamentable one, and one to be greatly deplored, but it ought not to influence this court to enlarge the statute to include an offense not within its constitutional authority.

As stated by the Supreme Court in Hammer vs. Dagenhart, recently decided —— U. S. ——:

"This court has not more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution."

It follows from these considerations that the demurrer to the indictment must be sustained and the indictment quashed and it is so ordered.

Endorsements: C-692, Tucson. In the United States District Court for the District of Arizona. United States of America vs. Harry C. Wheeler et al., defendants. Filed December 2nd, 1918. Mose Drachman, clerk.

54 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
HARRY C. WHEELER, GEORGE B. WILCOX, WALTER Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error.

Petition for writ of error.

Now comes the United States of America, by Thomas A. Flynn, the United States attorney for the District of Arizona, and respectfully represents that heretofore and on the 11th day of May, 1918, an indictment was duly found and returned in the District Court of the United States for the District of Arizona, at Tucson, in said district, by the grand jurors of the United States for said district, at the May, 1918, term of said court, in and by which indictment the following named persons, to wit, Harry C. Wheeler, John C. Greenway, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout were charged in four counts with certain alleged violations of the laws of the United States, to wit,
55 of section nineteen of the Criminal Code of the United States;

That thereafter and on the 21st day of October, 1918, the following-named persons, mentioned and named in said indictment, to wit, Harry C. Wheeler, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, were duly arraigned before the said District Court and each and all of the said persons so arraigned did thereupon demur to the said indictment upon certain grounds and for certain reasons set forth in the written demurrer on file in the said district court;

That thereupon and on said 21st day of October, 1918, the said demurrer came on for argument, and was duly argued before the

said District Court, by counsel appearing for the said demurrants and for the United States;

That thereafter and on the 2nd day of December, 1918, the said District Court did duly make and enter a certain decision, order, and judgment in said cause, in and by which decision, order, and judgment it did order an direct that the said demurrer be sustained and the said indictment quashed as against the said demurring parties, which said order was duly entered of record in said District Court;

That the said decision, order, and judgment of the said District Court sustaining the said demurrer to the said indictment, and to all the counts thereof, and quashing the said indictment and the several counts thereof, was based on the construction of the statute upon which the said indictment was founded, to wit, the said section nineteen, and your petitioner verily believes that the said
36 decision, order, and judgment is erroneous and prejudicial to the interests of the United States of America, and that in said decision, order, and judgment sustaining said demurrer and quashing said indictment, and each of the counts thereof, the said District Court erred, to the manifest prejudice of the United States;

That your petitioner tenders herewith its assignments of errors, which are filed with this petition.

Wherefore your petitioner prays that a writ of error issue in this behalf out of the Supreme Court of the United States, directed to the said District Court of the United States for the said District of Arizona, commanding that a transcript of the records and proceedings of this cause, duly authenticated, be sent to the Supreme Court of the United States, to the end that the said decision, order, and judgment sustaining said demurrer, and quashing said indictment, may be reviewed by the said Supreme Court and the error therein, if any hath been, be corrected and speedy justice be done in that behalf.

WILLIAM C. FITTS,
Special Assistant to the Attorney General.
THOMAS A. FLYNN,
United States Attorney for the District of Arizona.

Endorsements: In the Supreme Court of the United States. United States of America, plaintiff in error, vs. Harry C. Wheeler, George R. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error. Petition for writ of error. C-692, Tucson. Filed December 24th, 1918. Mose Drachman, clerk.

57 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
HARRY C. WHEELER, GEORGE B. WILCOX, WALTER Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error.

Assignments of error.

Now comes the United States of America, by Thomas A. Flynn, the United States attorney for the District of Arizona, and says that in the decision, order, and judgment made and entered in the District Court of the United States for the District of Arizona on the 2nd day of December, 1918, sustaining the demurrer of the above-named defendants in error to the said indictment and each of the counts thereof, and quashing said indictment as against said defendants in error, and each of the counts thereof, the said District Court committed manifest error, to the great prejudice of the United States, in this, to wit:

1. The court erred in sustaining the demurrer to the indictment.
2. The court erred in quashing the indictment.
3. The court erred in sustaining the demurrer to the first count in the indictment.
4. The court erred in sustaining the demurrer to the second count in the indictment.

58 5. The court erred in sustaining the demurrer to the third count in the indictment.

6. The court erred in sustaining the demurrer to the fourth count in the indictment.
7. The court erred in holding the indictment insufficient in law.
8. The court erred in holding that the indictment does not charge any offense against the laws of the United States.
9. The court erred in construing section 19 of the Criminal Code of the United States of March 4, 1909, as not covering and embracing as an offense the matters and things set forth and charged in the said indictment.

Wherefore, by reason of the manifest errors aforesaid, the said United States of America prays that the said decision, order, and judgment sustaining said demurrer and quashing said indictment be in all things annulled, reversed, and held for naught.

WILLIAM C. FITTS,
Special Assistant to the Attorney General.
THOMAS A. FLYNN,
United States Attorney for the District of Arizona.

Endorsements: In the Supreme Court of the United States. United States of America, plaintiff in error, vs. Harry C. Wheeler, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error. Assignments of error. C-692, Tucson. Filed December 24th, 1918. Mose Drachman, clerk.

59 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, vs. HARRY C. WHEELER, GEORGE B. WILCOX, WALTER DOUGLAS, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error.	Præcipe for transcript of record.

To Mose Drachman, clerk United States District Court for the District of Arizona:

You are hereby requested to include in the transcript of the record in the above-entitled matter, the following proceedings, pleadings, and papers, to wit:

1. Indictment.
2. Demurrers.
3. Minute entries.
4. Order and judgment of court sustaining demurrers and quashing indictment.
5. Opinion rendered by district court on order and judgment sustaining demurrers and quashing indictment.
6. Petition for writ of error.
7. Assignment of error.
8. Writ of error (Original to be sent).
9. Citation (original to be sent).
10. Acknowledgment of service of citation (original to be sent).
11. This præcipe.

WILLIAM C. FITTS,
Special Assistant Attorney General.
THOMAS A. FLYNN,
United States Attorney.

Endorsements: In the Supreme Court of the United States. United States of America, plaintiff in error, vs. Harry C. Wheeler,

George Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout. Præcipe for transcript of record. C–692, Tucson. Filed Dec. 24th, 1918. Mose Drachman, clerk.

60 In the United States District Court for the District of Arizona.

UNITED STATES OF AMERICA *vs.* HARRY C. WHEELER, JOHN C. GREENWAY, WALTER Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Brophy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants.	Docket No. C–692. Tucson.

Clerk's certificate to transcript of record.

UNITED STATES OF AMERICA,
District of Arizona, ss:

I, Mose Drachman, clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, numbered one to fifty-nine, inclusive, constitute and are a true, complete, and correct copy of the record in the case of United States of America v. Harry C. Wheeler, John C. Greenway, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, William H. Borphy, Reuben A. Clampitt, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants, Docket No. C–692, Tucson, in accordance with the præcipe filed and made a part of this transcript.

I also attach the original citation and writ of error filed in this case.

I further certify that the cost of preparing and certifying to said record amounts to the sum of thirty-three one thirty-five hundredths dollars ($33.35).

61 In testimony whereof I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Tucson, in said district, this third day of February, in the year of our Lord one thousand nine hundred nine-

teen, and of the Independence of the United States of American the one hundred forty-third.

[SEAL.] MOSE DRACHMAN,
Clerk United States District Court, District of Arizona.
By EFFIE D. BOYCE,
Chief Deputy Clerk.

62 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *vs.* HARRY C. WHEELER, GEORGE B. WILCOX, WALTER Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error.	Writ of error.

The President of the United States to the honorable, the judges of the District Court of the United States for the District of Arizona, greeting:

Because, in the record and proceedings, as also in the rendition of a decision, order, and judgment of a plea which is in the said District Court before you, or some of you, between the United States of America and Harry C. Wheeler, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, in and by which decision, order, and judgment a certain indictment, and each and all of the counts thereof a part, was quashed and the demurrer to the said indictment, and each of the counts thereof, was sustained, a manifest error hath
63 happened, to the great prejudice and damage of the said United States of America, as by its complaint more fully appears:

We being willing that that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, together with this writ, so that you have the same at the said city of Washington, in the

said District of Columbia, within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 24th day of December, in the year of our Lord one thousand nine hundred and eighteen.

[SEAL.]

MOSE DRACHMAN,
Clerk of the United States District Court for the District of Arizona.

Allowed by
WM. H. SAWTELLE,
United States District Judge for the District of Arizona.

64 In the Supreme Court of the United States. United States of America, plaintiff in error, vs. Harry C. Wheeler, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error. Writ of error. Filed Dec. 24th, 1918. Mose Drachman, clerk.

65 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
HARRY C. WHEELER, GEORGE B. WILCOX, WALTER DOUGLAS, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error. } Citation.

The President of the United States of America to Harry C. Wheeler, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, greeting:

You, and each of you, are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at

the city of Washington, in the District of Columbia, on the 22d day of February, in the year of our Lord, one thousand nine hundred and nineteen, pursuant to a writ of error, duly issued and now on file at the office of the clerk of the District Court of the United States for the District of Arizona, wherein the United States of America is plaintiff in error and you are defendants in error, then and there to show cause, if any there be, why the decision, order, and judgment rendered against the said plaintiff in error, as in said
66 writ of error mentioned, should not be annulled, reversed, and held for naught, and why speedy justice should not be done to the parties in that behalf

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 24th day of December, in the year of our Lord one thousand nine hundred and eighteen.

WM. H. SAWTELLE,
United States District Judge
for the District of Arizona.

67 We hereby, this 26th day of December, A. D. 1918, accept due personal service of the foregoing citation on behalf of Harry C. Wheeler, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Mrophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error.

E. E. ELLINWOOD,
JOHN MASON ROSS,
CLIFTON MATHEWS,
Attorneys for Defendants in Error.

68 In the Supreme Court of the United States. United States of America, plaintiff in error, vs. Harry C. Wheeler, George B. Wilcox, Walter Douglas, Robert Rae, Miles Merrill, Gerald Sherman, Michael J. Cunningham, James Allison, Bassett T. Watkins, Lemuel C. Shattuck, Michael J. Brophy, Philip Tovrea, Charles H. Hunt, James L. Gannon, Vance M. Johnson, Nelson C. Bledsoe, Joseph P. Hodgson, Alvan W. Howe, William P. Sims, Hascal Snodgrass, G. H. Dowell, and H. H. Stout, defendants in error. Citation. Filed Dec. 27, 1918. Mose Drachman, clerk. By Effie D. Botts, deputy clerk.

(Endorsement on cover:) File No. 26,933. Arizona D. C. U. S. Term No. 847. The United States of America, plaintiff in error, vs. Harry C. Wheeler, George B. Wilcox, Walter Douglas, et al. Filed February 11th, 1919. File No. 26,933.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
HARRY C. WHEELER ET AL. } No. 292.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

This is a writ of error, under the act of March 2, 1907 (ch. 2564, 34 Stat. 1246), to a judgment of the District Court of the United States for the District of Arizona sustaining a demurrer to an indictment charging the defendants with a violation of section 19, Criminal Code, and ordering the indictment quashed. (R. 17, 18.) The ground upon which the writ of error is predicated is that the judgment of the District Court was based upon "the construction of the statute on which the indictment is founded." There is no dispute (we assume) that the judgment was based on this ground.

THE STATUTE.

Section 19, Criminal Code, provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

THE INDICTMENT.

The indictment (R. 2–11) contained four counts, each setting up what was claimed to be a privilege of a citizen under the Constitution of the United States, injured by a conspiracy of the defendants. The United States will not press the fourth count, setting up a privilege to remain in the State of Arizona in order to fulfill any requirements of the selective draft act, as it is believed interference with the selective draft act was an incidental, not an intentional, effect of the conspiracy. The first three counts differ from each other as to the status of the injured parties, it being alleged generally in the first count that they were citizens of the United States residing

in the State of Arizona (R. 3), in the second that they were such citizens so residing, but were not citizens of the State of Arizona (R. 5, 6), and in the third count that they were such citizens so residing and were also citizens of Arizona (R. 8). The privilege secured by the Constitution of the United States to the injured persons so described is thus stated (R. 3):

> * * * peaceably there (in Arizona) to reside and remain, and to enjoy the blessings of liberty, rather than in another State of the United States, and the right and privilege pertaining to citizens of said State to be immune from unlawful deportation from that State to another State; and then and there were not persons charged in any State with treason, felony, or other crime, who had fled from justice of such State and been found in said State of Arizona, or persons found in said State of Arizona who had committed crimes or offenses against the United States in another State or in other States, or persons under sentence of imprisonment in a prison or prisons located in another State or in other States, or persons subject to extradition to a foreign country or foreign countries

It is further charged that the conspiracy:

> * * * was one for injuring, oppressing, threatening, and intimidating said citizens of the United States in the free exercise and enjoyment of said rights and privileges by unlawfully and with force and arms driving and conveying said citizens in a body from their

> said places of residence in said State of Arizona to and into another State, to wit, New Mexico, deporting said citizens from said State of Arizona to said State of New Mexico, and threatening said citizens with great bodily harm and death if they should return or endeavor to return to said State of Arizona. (R. 4.)

In the third count, dealing with citizens of the United States not citizens of Arizona, the privilege is stated (R. 6) as that of citizens of other States of the United States to reside and remain in Arizona, etc.

The District Court construed the indictment as sufficiently charging a conspiracy forcibly and against their will to deport citizens of the United States from the State of Arizona, where they resided and desired to remain, into the State of New Mexico, and to prevent them from returning to Arizona. (R. 19–33; 254 Fed. 611.)

ASSIGNMENTS OF ERROR.

The assignments of error (R. 36) are all summed up in the ninth, viz, that the court erred in construing section 19 of the Criminal Code as not covering and embracing the matters and things set forth and charged in the indictment.

ARGUMENT.

QUESTION INVOLVED.

There can now be no doubt of the constitutional power of Congress to enact section 19, Criminal Code. (*United States* v. *Cruikshank* (1875), 92 U. S. 542, 552, 553; *ex parte Yarbrough* (1883), 110 U. S. 651, 663–667; *Motes* v. *United States* (1900), 178 U. S. 458, 462, 463; *United States* v. *Mosley* (1915), 238 U. S. 383, 386.)

The only question in the case at bar, therefore, is whether the indictment charged an offense under that statute. That question, in its turn, is resolved into the narrower one, viz, whether the indictment sufficiently charged a right secured to a citizen by the Constitution and laws of the United States; for there can be no dispute that the indictment sufficiently charged a conspiracy to injure, oppress, threaten, and intimidate citizens of the United States in the free exercise and enjoyment of a right or rights conferred upon them by law. The indictment clearly sets forth the right which (it is claimed) is secured by the Constitution of the United States, viz, the right freely to come into and remain in one of the several States of the United States rather than in another; the right not to be forcibly and against one's will deported or expelled from one of said several States into another, and prevented from returning thereto.

The sole question in the case at bar is whether or not there is such a right secured to a citizen by the Constitution of the United States.

The right which, the indictment alleges, is secured to a citizen as such by the Constitution of the United States is the right not to be, against his will, deported from one of the United States into another, and not to be, against his will, prevented from returning to the State from which he has been expelled. This right (we claim) is merely a form of the more general right to free ingress or regress to or from one of the United States—to free mobility as between the several States. This is evidently true because the right to free ingress or regress to or from a State implies necessarily the right to determine for oneself the time at which and the circumstances under which such ingress or regress shall take place. A citizen can not in any just sense be said to have a full and complete freedom of egress from a State if third persons are permitted to overpower his volition and thus determine for him the time and circumstances of his departure by forcibly expelling him from the State, any more than he can be said to have a full and complete right of ingress if third persons are permitted, after having detruded him, to prevent his return by threats and intimidation. We claim, therefore, that the question before the court is this, viz:

Whether a citizen as such has a right secured by the Constitution of the United States to free ingress and egress to and from one of the United States.[1]

[1] The science of physics, which is the mechanical side of politics, has but one word, viz, *inertia*, to express "the property of matter by which it continues in its existing state of *rest* or uniform *motion* in a straight line unless that state is changed by external force."

Our claim, and our entire claim, is that this right is secured, not by any express provision of the Constitution (except in so far as Article XIV of the amendments enlarges the scope of the term "citizen of the United States"), but impliedly by the creation of citizenship of the United States, as contradistinguished from purely State citizenship, which the Constitution as certainly and immediately effected as it did the Union itself. It was "the people of the United States" who ordained and established the Constitution, and it was they who, upon its ordination and establishment, became citizens of the United States. (*McCullough* v. *Maryland*, 4 Wheat. 316, 403, 404.)

The simplest and most direct method for approaching a determination of the question whether the Constitution of the United States secures to a citizen of the United States a right to free ingress and egrees to and from a State is to consider what the legal condition of a citizen forcibly expelled from one of the States and forcibly prevented from returning was prior to the establishment of the United States under the Constitution, and then compare it with the legal condition of the same person after that event. In doing this, we attribute to such citizen as large legal rights as possible, irrespective altogether of the Constitution of the United States, without meaning to affirm that his rights were always and everywhere so complete. The less protection was afforded

him, without calling in the aid of the Constitution of the United States, the greater the probability that the Constitution afforded him more complete protection.

Prior to the Constitution the rights of such persons (if any) would be governed by international or municipal law. They would not differ materially in this respect from the rights of persons who were expelled at the present day from one of the United States into Canada or Mexico. In so far as the political bodies themselves were concerned, the only action possible would be diplomatic correspondence, followed (it may be) by reprisals or even by war. In so far as the individuals injured were concerned, there might be, either under international or under municipal law, prosecutions in the State *ab quo*, or, perhaps in the State *ad quem*, if it could be said that the crime was consummated in the latter.[1] Both of these remedies, possibly open to the individuals injured, would be subject to practical handicaps, as to the State *ab quo* in their inability to prosecute in person the case in that venue; as to the State *ad quem* in the absence of jurisdiction *in personam* of the defendants.

What would be the situation after the Constitution? For, in so far as greater or additional rights appear at the later period, such greater or additional rights must necessarily be rights granted and hence secured by the Constitution.

[1] This matter is fully discussed in Moore's Digest of International Law, Vol. II, pp. 225–268, and was the subject of considerable diplomatic correspondence in *Cuttings Case*, ibid. 228–242, where a libel of a Mexican citizen was published in this country by an American citizen.

As to the political bodies, the right to diplomatic correspondence, reprisals, and war was expressly taken away by the Constitution. Section 10 of Article I provides that no State shall enter into any treaty, alliance, or confederation; and that no State shall enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. The States were not, however, left remediless. This court derived from the express provisions and general structure of the Constitution a new and different remedial right, viz., the right to sue in the Federal courts either the political body or the individuals responsible for the damage. (*South Carolina* v. *Georgia* (1876), 93 U. S. 4, 9; *Missouri* v. *Illinois*, (1901) 180 U. S. 208, 241; s. c. 200 U. S. 496, 518–520; *Kansas* v. *Colorado* (1902), 185 U. S. 125, 146, 147; s. c. (1907), 206 U. S. 46, 96, 97; *Pennsylvania* v. *Wheeling Bridge Co.* (1851), 13 How. 518; *Georgia* v. *Tennessee Copper Co.* (1907), 206 U. S. 230, 237.) In *South Carolina* v. *Georgia*, *ubi supra*, it was held that a compact lawfully made between two States prior to the Constitution was deprived of validity by the formation of the Federal Union, so that the rights of the States as to its subject matter were governed thereafter by the provisions of the Constitution. In *Georgia* v. *Tennessee Copper Co.*, *ubi supra*, the court said:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree

> to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. (*Missouri* v. *Illinois*, 180 U. S. 208, 241.)

As to the individuals injured, it is probable that that they have retained the rights they had before the Constitution, viz, those of prosecuting the individual wrongdoers either in the State *ab quo* or in the State *ad quem*, where part of the offense was done in the latter. This they can do either because the principles of international law are recognized as impliedly adopted into the common law of the several States, or because the municipal law of the several States expressly provides punishment for such offenses.[1] The use of such remedies would, however, be subject to the practical difficulties noted above in speaking of the situation prior to the Constitution.

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[1] We do not assert that the law is settled. There may still be some doubt as to the venue of action, criminal or tortious, in cases of an injury done in one State but producing its effect in another. (*Slack* v. *Walcott* (1825), 3 Mason 508, 516; *Stillman* v. *Manufacturing Co.* (1847), 3 Woodb. & M. 538, 545–548; *Foot* v. *Edwards* (1855), 3 Blatch. 310, 314–316; *Manville Co.* v. *Worcester* (1884), 138 Mass. 89, 90.) As to criminal liability the courts seem to differ. (*State* v. *Lord* (1844), 16 N. H. 357 *pro*; *State* v. *Babcock* (1862), 1 Vroom (N. J.), 29, 30–32 *contra*.) The former is referred to as law in *Manville Co.* v. *Worcester*, *supra*. In *ex parte Joseph Smith* (the Mormon prophet), (1842), 3 McLean 121, it was held that a person inciting in Illinois to a murder in Missouri did not become an accessory before the fact in Missouri (nor was he a fugitive from the justice of that State). Judge Pope said (3 McLean 134, 135):

"It is the duty of the State of Illinois to make it criminal in one of its citizens to aid, abet, counsel, or advise, any person to commit a crime in her sister State. Any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could have

The question is (and it is the vital and determining question in the case at bar), Did the Constitution change the situation, *as respects the individuals injured*, in any respect? Did it give them greater or additional rights? Or did it leave them as to their rights in the same situation in which it found them?

One thing, at least, is entirely clear. In one most important and significant respect (as we have stated above) the Constitution enlarged their status and consequently, in some respects (we need not consider at present in what), their rights. Whereas before they were merely citizens of one particular State, being aliens in a sense to all others, they now became in addition citizens of the United States. This (as has been said) was implied in the very formation of the Federal Union. A new allegiance was created with a new corresponding duty in the liege of protection to the subjects. Their horizon was enlarged, their personality was projected, they became possessed of a new and vaster heritage and entitled to regard as their political or civic demesne every portion of earth, air, and water over which the

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no agency in his conviction and punishment. * * * But when the offense is perpetrated in Illinois, the only right of Missouri is, to insist that Illinois compel her citizens to forbear to annoy her. This she has a right to expect. For the neglect of it, nations go to war and violate territory."

It is perhaps worthy of passing notice that this difficulty would not arise as to an accessory to a Federal offense. (*Hoss* v. *United States*, 232 Fed. 328, 335.) There is no question of the power of Congress over such subjects if, e. g., foreign relations are involved (*United States* v. *Arjona* (1887), 120 U. S. 479, 484), or the power to regulate interstate commerce (*Wisconsin* v. *Duluth* (1877), 96 U. S. 379; *United States* v. *Rio Grande Irrigation Co.* (1899), 174 U. S. 690.)

sovereignty of the United States extended. They came within "the peace of the United States" (*Ex parte Neagle*, 135 U. S. 1, 69). Their progress therefore from one State to another (or into the Territories), their egress from one, their ingress into another while it might find them in places where their State citizenship would not give them all the rights it did at their domiciles, would never find them in any place where the all prevailing quality of citizenship of the United States would not accompany them, with all the rights, substantive and remedial, which the term denotes.

It is important to emphasize the fact (as we claim) that Federal citizenship, with all its main privileges and immunities, came from the very fact of the institution of the new Government under the Constitution, and not from the fourteenth amendment. Of this there can be no possible doubt.

It is true that the original Constitution did not in express terms define citizens of the United States, or secure their privileges and immunities. Section 2 of Article IV provided that the citizens of each State should be entitled to all privileges and immunities of citizens in the several States; but the only references to a broader status are the provisions that Representatives, Senators, and the President shall be "citizens of the United States." It was early assumed and held, however, that the Constitution impliedly created a citizenship of the United States, and it followed necessarily that it also impliedly secured the requisite privileges and immunities of such a status.

In chapter 3 of the acts of the First Congress (1 Stat. 103) provision was made for the admission of aliens to citizenship of the United States, and the children of "citizens of the United States" born abroad were declared "natural born citizens." In *Talbot* v. *Janson* (1795), 3 Dallas 133, it appeared that one Ballard, having been a citizen of Virginia, had, pursuant to a statute of that State, renounced his allegiance (3 Dall. 136). It was held that he remained, nevertheless, a citizen of the United States. Mr. Justice Paterson (who had been an active member of the Constitutional Convention) said (3 Dall. 153, 154):

> The act of the Legislature of Virginia does not apply. Ballard was a citizen of Virginia, and also of the United States. If the Legislature of Virginia pass an act specifying the causes of expatriation and prescribing the manner in which it is to be effected by the citizens of that State, what can be its operation on the citizens of the United States? If the act of Virginia affects Ballard's citizenship, so far as respects that State, can it touch his citizenship so far as it regards the United States? Allegiance to a particular State is one thing; allegiance to the United States is another. Will it be said that the renunciation of allegiance to the former implies or draws after it a renunciation of allegiance to the latter? The sovereignties are different; the allegiance is different; the right, too, may be different.

So in *State* v. *Hunt* (1834), 2 Hill (S. C.), 1, which arose under the nullification acts of South Carolina, it was held that a statute prescribing an oath merely to bear true allegiance to the State of South Carolina was contrary to the Constitution of the United States, as omitting the paramount allegiance to the Federal Government. (See especially pp. 218–220.) It was early held that a citizen of a Territory was not a citizen of a State within the meaning of the Constitution (*Hepburn* v. *Ellzey* (1804), 2 Cranch, 445; *New Orleans* v. *Winter* (1816), 1 Wheat. 91), but the same cases affirmed that he was a citizen of the United States.[1] In *American Ins. Co.* v. *Canter* (1828), 1 Pet. 511, 542, Chief Justice Marshall said of the treaty making Florida a part of the territory of the United States:

> This treaty is the law of the land and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.

In *Gassies* v. *Ballon* (1832), 6 Pet. 761, it was held that naturalization—equivalent to citizenship of the United States—and residence made one a citizen of the State. "A citizen of the United States residing in any State of the Union is a citizen of that State."[2]

[1] We do not, of course, mean to say that Congress may not determine whether a citizen of a particular Territory is a citizen of the United States or not, i. e., that such citizens are made citizens of the United States by the Constitution. (See *Gonzales* v. *Williams* (1904), 192 U. S. 1, 13.)

[2] This decision seems to anticipate that portion of the fourteenth amendment dealing with the same subject.

In the elaborate judgment in *Lynch* v. *Clarke* (1844), 1 Sandford's Chancery Reports 583, 640, 641, 642, Vice Chancellor Sandford said:

> But in reference to all foreign nations we stand as one single and united people, *The United States of America*. The right of citizenship, a right which is not only important as between the different States, but has an essential bearing in our intercourse with other nations, and the privileges conceded by them to our citizens, is therefore not a matter of mere state concern. It is necessarily a *national right* and character. It appertains to us, not in respect to the State of New York, but in respect of the United States.
>
> In speaking of this right in its proper and enlarged sense, we never say of anyone that he is a citizen of the State of New York; we say he is a citizen of the United States. Our own Constitution recognizes the propriety of this mode of expression, in declaring that no person except a *native citizen of the United States* shall be eligible to the office of governor. A merchant trading in Europe and having occasion to resort to treaty stipulations with foreign powers would neither be recognized or understood if he should declare that he was a citizen of the State of New York. It is only in his character as a citizen of the United States, an *American citizen*, as by universal comity we are distinguished from the citizens of other Republics on this continent, that he would be regarded abroad, or received as entitled to the rights and immunities secured to him by

the government of his country. I speak now of the relationship of a citizen in its general and enlarged sense. In its particular sense it is applicable to the rights and duties of our people in and toward the States in which they reside. And in this sense, while a citizen of one State may hold lands in another State, yet he can not interfere in the elections of the latter, or in any of those rights which from the nature of the government belong exclusively to the citizens of such State. As citizens, we owe a particular allegiance to the sovereignty of our own State, and a general allegiance to the confederated sovereignty of the United States.

The provisions of the Constitution of the United States demonstrate that the right of citizenship, as distinguished from alienage, is a national right or condition, and does not pertain to the individual States. And while the Constitution recognizes the particular citizenship which I have mentioned (*Cooper's Lessee* v. *Galbraith*, 3 Wash. C. C. R. 546), it is evident that the subject of alienage must be controlled by the general, and not by the local allegiance. * * *

A few brief considerations, out of many which force themselves upon the mind, will illustrate the position that the right of citizenship in its enlarged sense was, after the adoption of the Constitution, not only a national right, but from the nature of the case it must from thenceforth be governed by the law of the whole Nation and the acts of the National Legislature.

In *Prentiss* v. *Brennan* (1851), 2 Blatch 162, 164, 165, Judge Nelson said:

> A person may be a citizen of the United States and not a citizen of any particular State. This is the condition of citizens residing in the District of Columbia, and in the Territories of the United States, or who have taken up a residence abroad, and others that might be mentioned.

Finally in the *Woman's Suffrage Case*, *Minor* v. *Hoppersett* (1874), 21 Wall. 162, 165, 166, 167, the Chief Justice said:

> Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There can not be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is compensated for the other; allegiance for protection and protection for allegiance. * * *
>
> To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

Looking at the Constitution itself we find that it was ordained and established by "the people of the United States," and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth, and that had by Articles of Confederation and Perpetual Union, in which they took the name of "The United States of America," entered into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all forces offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the Nation created by its adoption. He was one of the persons associating together to form the Nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at that time, but never as to their citizenship if they were.[1]

[1] See the law stated the same way after the fourteenth amendment in *Slaughter House Cases* (1872), 16 Wall. 36, 74; *Robertson* v. *Cease* (1878), 97 U. S. 646, 648–650; *Marks* v. *Marks* (1896), 75 Fed. 321, 324; *Hammerstein* v. *Lyne* (1912), 200 Fed. 165, 170–172; *Hough* v. *Societe* (1916), 231 Fed. 341, 343; *Pannill* v. *Jones Co.* (1918), 252 Fed. 910, 914, 915.

It is therefore (as we have stated) clear that the ordination of the Federal Union established a new status—citizenship of the United States—additional and paramount to State citizenship. Whether every citizen of one of the several States was or is, by that fact alone, a citizen of the United States, as Justice Curtis argued in the *Dred Scott Case* (1857), 19 How. 393, 582, or whether the better view is that of the Chief Justice given in that same case to the contrary is immaterial in the case at bar.[1] It is certain that Federal citizenship has always, since the foundation of the United States been, and now is, something beyond and above State citizenship; so that, e. g., a person could be a citizen of the United States without being a citizen of any one of the several States.

Before proceeding to a consideration of the privileges and immunities of citizens of the United States, it is well to consider first what such privileges and immunities are not. Section 2 of Article IV of the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States, and that persons charged in any State with crime who shall flee from justice and be found in another State shall be delivered up to be

[1] In 1863, prior to the fourteenth amendment, the Supreme Court of Wisconsin held in *In re Wehlitz*, 16 Wis. 443, that an alien could be a citizen of one of the several States, though not a citizen of the United States. In *Lanz* v. *Randall* (1876), 4 Dillon 425, 429, Justice Miller said, and in *Minneapolis* v. *Reum* (1893), 56 Fed. 576, the Court of Appeals for the Eighth Circuit held that an alien, who had merely declared his intention, was still an alien though the law of the State where he resided had conferred upon him all the privileges of citizenship. Presumably he was not, nevertheless, a citizen of the State in question.

removed to the State having jurisdiction of the crime. The New England Confederacy of 1643 had a provision for the mutual reception of settlers and the mutual extradition of criminals (Schouler, Constitutional Studies, pp. 72, 73), and Article IV of the Articles of Confederation of 1777 provided that—

> * * * the free inhabitants of each of these States * * * shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State.

While the provision of section 2 of Article IV of the Constitution relative to privileges and immunities is not so detailed as that of Article IV of the Articles of Confederation, and does not specifically mention the right to free ingress and regress to and from any other State, there has never been any doubt that such a right was necessarily included. In the approved opinion of Justice Washington in *Corfield* v. *Coryell* (1825), 4 Wash. C. C. 371, one of the privileges secured by section 2 of Article IV is affirmed as—

> The right of a citizen of one State to pass though, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise.

To the same effect are the opinions of this court in *Paul* v. *Virginia* (1868), 8 Wall. 168, 180, and *Ward* v. *Maryland* (1870), 12 Wall. 418, 430. In the *Slaughter House Cases* (1872), 16 Wall. 36, 75, the

court, after referring to the provisions in the Articles of Confederation and in the Constitution on the subject, said:

> There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

It will thus be seen that the right of *a citizen of one of the several States* to free ingress and regress to or from *another State* (a right somewhat similar to the one set up in the indictment in the case at bar), is secured in some sense by section 2 of Article IV of the Constitution. We, however, expressly disclaim any reliance upon *this* constitutional provision. It was held in the *Slaughter House Cases*, 16 Wall. 36, that the rights referred to in section 2 of Article IV are the fundamental rights of citizenship, as such, and not the rights peculiarly conferred upon the *citizens of the United States* first created by the Constitution. The rights of ingress and regress are impliedly included in section 2 of Article IV merely because included in the fundamental rights to life, liberty, and the pursuit of happiness. These rights a citizen of a State is entitled to as such. He has the right freely to come into and to leave his own State. The outland citizen acquires this right under the Constitution solely because the

domestic citizen has it, and only to the same extent.[1] He is entitled only to be free from discrimination by the State, without "reasonable ground for the diversity of treatment." (*Travis* v. *Yale & Towne Manufacturing Co.*, decided March 1, 1920.) His only remedy, therefore, under section 2 of Article IV for actions such as are complained of in the case at bar would be by prosecution in the State courts, if the laws of the State provided such a remedy. It is possible that Congress might provide a remedy, if the State discriminated against him, in regard to such outrages, on account of his outland citizenship; but Congress (so far as we are aware) has never done so.[2] At any rate section 19, Criminal Code, does not do so. It is therefore not enough in the case at bar to show that the right set up in the indictment is a fundamental right common to all citizens of civilized States everywhere. It must be shown in addition that it is a right peculiar to the complex, Federal citizenship which is at the basis of the "indissoluble Union of indestructible States" created by the Constitution of the United States.

This (we believe) can be done by an analysis of the content of the term "citizen of the United States." In this term are included two fundamental concepts, bound together and interacting, viz, the concept of

[1] See the interesting debate between Senators Edmunds and Trumbull when the supplementary enforcement act of April 20, 1871, was before the Senate. (Cong. Globe, vol. 99, April 14, 1871, pp. 691–695, especially 693, where it is debated whether the State of South Carolina could, without violating Article IV, section 2, reduce a free citizen of Vermont to slavery.)

[2] Even section 2 of the enforcement act of April 20, 1871, ch. 22 (R. S. 5519), declared unconstitutional in *United States* v. *Harris* (1882), 106 U. S. 629, does not (it would seem) go this far.

"the United States" as a corporate entity, exercising full and paramount sovereignty within its constitutional powers over all the persons within its territorial limits, taking after it the singular predicate "is"; and the concept of the several States as a collective body, neither destroyed nor consolidated by the Constitution, retaining all their soverign powers and activities over the persons within their territorial limits except in so far as those powers have been granted to the collective aggregate, taking after it the plural predicate "are." (See especially Professor Langdell's article in 12 Harvard Law Review 365, 367–370.) As to the former aspect this court said in *Tennessee* v. *Davis*, 100 U. S. 257, 263:

> The United States is a Government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States.

As to both aspects this court said in *Ex parte Siebold*, 100 U. S. 371, 394:

> * * * Here again we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily in-

volves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both can not be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land."

And again the court said:

* * * If we indulge in such impracticable views as these, and keep on refining and refining, we shall drive the National Government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation.

(See also *Hoke* v. *United States*, 227 U. S. 308, 321, 322.)

A citizen of the United States is therefore a citizen of a Union, but it is a *Federal* Union. If he were merely the citizen of a Union, he would have a right to pass freely over all the territory subject to that Union, State lines would be immaterial, an unlawful deportation from a place within a State to another place within the same State would be as much a violation of his right as an unlawful deportation from

one place within the State to a place within another State, and Congress could constitutionally provide a remedy for the one violation equally with the other. That Congress can not constitutionally go so far results from the fact that the Union is composed of real (though in some respects subordinate) political bodies, carrying on the functions of government within their respective territories, with laws enacted by State legislatures, administered by State executive officers, interpreted and enforced by State courts of justice. The existence of the States prevents, therefore, a citizen of the United States from deriving, as such, a right under the Constitution of the United States to territorial mobility within the limits of any particular State. To that extent he must trust to, and is dependent upon, the laws and agencies of the several States. The right, however, to move freely, *suo intuitu*, from one State into another State is an entirely different matter and brings into the problem the concept of the Union. His rights of movement within the territories of the political sovereignty known, e. g., as the State of Arizona is one thing, and is secured to him by the constitution and laws of that State. His right, as a member of the Union, freely to enter into the territories of that sovereign State, to enjoy the privileges and be subject to the burdens attached to its government, to enjoy likewise the privileges and be subject to the burdens of the Federal Government to the full extent of their existence in the State in question; the correlative right freely to leave the State and renounce the privi-

leges and burdens aforesaid; that (we submit) is an entirely different thing. It is a right necessarily inherent in Federal citizenship and secured, therefore, by the Constitution of the United States. Unless this be true, no Union was in fact established in 1789, because no less than this can be properly attributed to citizenship of the United States.

The *Federal* feature of the Union and that aspect of citizenship under the Constitution of the United States is given all the scope it is entitled to when the rights of a citizen of the United States within the territorial limits of a State are left to the constitution and laws of the latter. The Union feature and aspect must also be given their due effect, and this can only be done by separating the external, interstate right to move freely from one State to another from the internal intrastate right, attributing the former to the Constitution of the United States which alone established the Union and created citizenship of the United States, as the latter has been attributed to the constitution and laws of the several States. This is to give (we think) the only proper meaning and effect to the term "citizen of the United States" because it is the only meaning which brings out and gives due weight to the dual Government established by the Constitution. On the one side, it leaves to the several States their proper sovereignty over matters which concern only their own government. On the other, it maintains the undisputed supremacy of the United States over those matters which are partly external to the par-

ticular State involved, affect interstate relations, and interest citizens of the United States as such, no matter where they may reside, or of what particular State they happen to be citizens.

The injury done by the defendants in the case at bar has a double aspect, one toward the individuals deported and the other toward the State into which they were deported, in this case New Mexico. By their deportation the individuals became, or might become, a charge upon the State of New Mexico, a disturbance of its peace, or an offense to its own State policy. It has been shown above that according to the decisions of this court, and especially the decisions in *Kansas* v. *Colorado* and *Missouri* v. *Illinois*, *supra*, the offended State was secured by the Constitution of the United States a right to sue the offending State in the Federal courts, and to have applied there, not the law of the offending State, but a general or international law. Is not this a strong reason for believing that the Constitution also secured a right to the individuals concerned, not as citizens of Arizona but as citizens of the United States, to have their cases determined in a Federal court by Federal law? Do not the same reasons which induced this court to substitute for compacts, reprisals, or war a resort to Federal courts and international or interstate law in the case of the political bodies concerned, require the conclusion that citizens of the United States expelled from a State are not compelled to resort to the courts and laws of the State from which they have been banished, or else go remediless? We

submit that the rights of the State, and the rights of the individuals, arising out of the injury done to both, are so closely connected in the very heart of the organization of the Federal Union as to make them both secured by the Constitution of the United States. If a mob may, without violating any right secured by the Constitution of the United States, expel a citizen of the United States from New Mexico into Arizona, a mob in Arizona may, with the same limited liability, expel him into Texas, mobs in all the other States may join in the game until the citizen is driven to the high seas or some foreign land. Since there is no question that his rights *then* become legitimately a matter of Federal concern, it follows, according to the argument of the court below, that the right of a citizen of the United States to free movement of himself and his property to and from other political bodies or sovereignties only becomes a matter of interest to the political body of which he is a member when he has been driven foot and baggage from the confines of his own country.

In order to make the argument concrete, let two examples be taken based on the conditions which caused the original enactment of section 19, Criminal Code. Suppose that Kansas, at the time of her troubles, had been a State (instead of a Territory) which had "voted slavery up" under the doctrine of Mr. Douglas's "squatter sovereignty"; that citizens of New England desired to emigrate there in good faith to take up their residence in the State and to lawfully acquire citizenship so as to aid in "voting

slavery down"; that "the Missouri Ruffians," being opposed to their political principles, banded themselves together to keep them out of the State by force of arms, or by violence and bloodshed to expel them from the State after they had settled themselves in their new home. Would any fair-minded person at this day, when the passions of the conflict have subsided, doubt for a moment that a right secured by the Constitution of the United States had been injured by such action?

Take the case of the Ku-Klux Klan, at which section 19 of the Criminal Code was particularly aimed. Suppose the Klan went "in disguise on the highways" (as was apparently its custom), for the purpose of preventing the "scalawags" and "carpetbaggers" from entering into the State of Georgia, there to exercise their inalienable right of voting the Republican ticket and holding the State offices; or that (the "carpetbaggers" and "scalawags" having effected an entrance) the object was to drive them out, rescue the government from their clutches and return it to the Democratic Party. Would any one at the present day, no matter what his view of the Klan on the one side or the "carpetbaggers" on the other, hesitate for a moment to attribute to the latter a right secured by the Constitution of the United States to make Georgia Republican if they could do so by lawful means?

One of the objections which may be urged against our claim that a citizen of the United States has a right secured by the Constitution of the United

States not to be forcibly prevented from entering the territory of a State, and not to be forcibly expelled therefrom is that the logic of the argument would inevitably lead to the conclusion that every crime which, as its natural effect, prevented a citizen from entering the territory of a State, or deported him therefrom, against his will, came, for that reason, within Federal jurisdiction. For example (it may be said), kidnaping, in the majority of cases, involves forcibly deporting a person from one State to another, and yet clearly it is an offense not cognizable in the Federal courts. This objection, however, is wholly without merit, being based upon a misapprehension of our claim. In order to bring the case within section 19, Criminal Code, there must be *an intent* on the part of the conspirators to violate the constitutional right in question, not merely an intent to commit a crime, e. g., kidnaping, *the incidental effect* of which is to injure the constitutional right. To put the matter concretely, the *purpose*, *intent*, and *end* of the conspiracy must be forcibly to deport the citizen from the State of Arizona; to get him out of the State; and not merely to kidnap him for revenge or ransom with the expulsion or deportation from the State merely lurking in the background as a possible contingency involved in the crime. In every single case in which this court has applied section 19, Criminal Code, the same claim that the offense was only assault, murder, kidnaping, etc., could have been, and in some of them evidently was made. Yet this court upheld the Federal jurisdiction because the real purpose of the

conspiracy was, not to murder, assault, etc., but to prevent voting, to prevent informing of crime, to prevent egress from a State, etc., etc. For example, in *United States* v. *Waddell*, 112 U. S. 76, it was held that section 19, Criminal Code, covered a conspiracy to prevent a citizen from making and completing a homestead entry, but Justice Miller said (112 U. S. 80):

> The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the State and by its courts.

It is different, however, (he says) when, as in that case, the acts are done "for the purpose and with the intent" to violate the constitutional right. Consequently, in *Buchanan* v. *United States* (C. C. A. 8th), 233 Fed. 257, it was held that the *Waddell Case* would not apply if the actions of the defendants toward the homesteader were done with the intent to remove improvements which they claimed to own.

In the case at bar the indictment specifically alleges that the purpose and object of the conspiracy was to deport the citizens described *from the State of Arizona into the State of New Mexico*, and not merely to assault or kidnap them. The assaulting and kidnaping were merely means to the end which end was the violation of a right secured under the Constitution of the United States.

THE AUTHORITIES.

AUTHORITIES PRIOR TO THE FOURTEENTH AMENDMENT.

We claim that the fourteenth amendment has had absolutely no effect upon the question presented in the case at bar, except incidentally in so far as it has, perhaps, enlarged and constitutionally fixed the status of a citizen of the United States. Since, however, some claim may be made by defendants in error that the case at bar is governed by the provisions of that amendment requiring State action (an element lacking in the present case), it is deemed best to divide the authorities with reference to the amendment.

On December 20, 1823, South Carolina passed an act which prohibited the migrating or bringing into the State of any free Negro. If such Negro should come or be introduced into the State, he should depart within fifteen days, or be subject to corporal punishment. Another act seems to have made him a slave. (See Reports Committees, 27th Cong., 3d sess., House Rep. 80, p. 15.) These acts were declared unconstitutional by Justice Johnson of this court in *Ex parte Henry Eckstein* (ibid. p. 27), and by Attorney General Wirt (ibid. p. 35). It is true that these rulings were based upon the ground that the acts interfered with the exclusive power of Congress to regulate commerce; but throughout all the discussion runs the idea that the real objection is the injury to the rights of citizens. The acts were

the subject of strenuous complaints by the State of Massachusetts to the State of South Carolina (Mass. Leg. Docs. 1845, Senate No. 31). Samuel Hoar was sent to South Carolina as the agent of Massachusetts to protect her citizens, but was driven out by a mob (ibid. p. 23). Massachusetts adopted a solemn Declaration and Resolves in which, under a thin disguise, she threatened reprisals.[1]

In *Prigg* v. *Pennsylvania* (1842), 16 Pet. 539, the question was as to the constitutionality of an act of Pennsylvania prohibiting the taking or carrying away of a Negro to hold him in slavery. It was held unconstitutional as violative of that portion of section 2, Article IV, providing that no person held in service in one State and escaping shall be discharged by virtue of the law of another State but "shall be delivered up, on claim of the

[1] Proceedings by South Carolina tending to "nullification" of the tariff laws were dealt with by Congress in the act of March 2, 1833, ch. 57, 4 Stat. 632, which gave a right of action in the United States courts to any one injured in his person or property on account of any act done by him under any law of the United States for the protection of the revenue, and gave a right of removal to the United States courts of any prosecution begun in a State court against a revenue officer of the United States for an act done under color of office. This act was constitutional. (See *Tennessee* v. *Davis* (1879), 100 U. S. 257, 268.) If an officer of the United States may be protected by Congress in the exercise of his duties, it would seem that a citizen of the United States could equally be protected by Congress in his right to acquire the residence in a State essential to holding the Federal office, e. g., sec. 1, Jud. Code, Comp. Stats. sec. 968, makes it a high misdemeanor for a district judge not to reside in the district for which he is appointed. In *United States* v. *Patrick* (1893), 54 Fed. 338 (see especially pages 348, 349), Judge (afterwards Justice) Jackson held that a citizen of the United States had a right secured to him under the Constitution of the United States to hold a Federal office. Has he not the same right to acquire the residence necessary, either legally or practically to hold it?

party to whom such service may be due." It was held that the right to the return of a slave was a national one, created and secured by the Constitution of the United States, and that, therefore, the words quoted above placed an obligation, not upon the State in which the slave was found but on the National Government. Justice Story, delivering the opinion of the court said (16 Pet. 623):

> Before the adoption of the Constitution, no State had any power whatsoever over the subject, except within its own territorial limits, and could not bind the sovereignty or the legislation of other States. Whenever the right was acknowledged or the duty enforced in any State, it was as a matter of comity and favour, and not as a matter of strict moral, political, or international obligation or duty. Under the Constitution it is recognised as an absolute, positive right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by State sovereignty or State legislation. It is, therefore, in a just sense a new and positive right, independent of comity, confined to no territorial limits, and bounded by no State institutions or policy. The natural inference deducible from this consideration certainly is, in the absence of any positive delegation of power to the State legislatures, that it belongs to the legislative department of the National Government, to which it owes its origin and establishment. It would be a strange anomaly, and forced construction, to suppose that the National Government meant to rely for the due fulfilment of its own proper

> duties and the rights, which it intended to secure, upon State legislation, and not upon that of the Union. A fortiori, it would be more objectionable to suppose that a power, which was to be the same throughout the Union, should be confided to State sovereignty, which could not rightfully act beyond its own territorial limits.

In the *Passenger Cases* (1849), 7 How. 283, acts of New York and Massachusetts levying a tax on aliens brought to the ports of the respective States were held invalid as being in conflict with the power of the United States to regulate commerce. While the opinions of most of the justices go upon this point, certain remarks may properly be quoted from the dissenting opinion of the Chief Justice, not merely because of his legal ability, but also because they bring out clearly the points involved in the case at bar. He said (7 How. 465, 466, 467):

> And the first inquiry is whether, under the Constitution of the United States, the Federal Government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the General Government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of Congress which can

justly be so construed. But it is not necessay to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce.
* * *

If these cases are to stand, the right of the State is undoubted. And it is equally clear that, if it may remove from among its citizens any person or description of persons whom it regards as injurious to their welfare, it follows that it may meet them at the threshold and prevent them from entering. For it will hardly be said that the United States may permit them to enter, and compel the State to receive them, and that the State may immediately afterwards expel them. There could be no reason of policy or humanity for compelling the States, by the power of Congress, to imbibe the poison, and then leaving them to find a remedy for it by their own exertions and at their own expense. Certainly no such distinction can be found in the Constitution, and such a division of power would be an in-

consistency, not to say an absurdity, for which I presume no one will contend. If the State has the power to determine whether the persons objected to shall remain in the State in association with its citizens, it must, as an incident inseparably connected with it, have the right also to determine who shall enter.

* * *

Neither can this be a concurrent power, and whether it belongs to the General or to the State Government, the sovereignty which possesses the right must in its exercise be altogether independent of the other. If the United States have the power, then any legislation by the State in conflict with a treaty or act of Congress would be void. And if the States possess it, then any act on the subject by the General Government, in conflict with the State law, would also be void, and this court bound to disregard it. It must be paramount and absolute in the sovereignty which possesses it. A concurrent and equal power in the United States and in the States as to who should and who should not be permitted to reside in a State, would be a direct conflict of powers repugnant to each other, continually thwarting and defeating its exercise by either and could result in nothing but disorder and confusion.

Even these views, however, he was not willing to apply to citizens. He concluded as follows (7 How. 492):

In speaking of the taxing power in this case, I must, however, be understood as speaking

of it as it is presented in the record—that is to say, as the case of passengers from a foreign port. The provisions contained in that law relating to American citizens who are passengers from the ports of other States is a different question, and involves very different considerations. It is not now before us; yet, in order to avoid misunderstanding, it is proper to say, that, in my opinion, it can not be maintained. Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote States or Territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and Territory of the Union. And the various provisions in the Constitution of the United States—such, for example, as the right to sue in a Federal court sitting in another State, the right to pursue and reclaim one who has escaped from service, the equal privileges and immunities secured to citizens of other States, and the provision that vessels bound to or from one State to another shall not be obliged to enter and clear or pay duties—all prove that it intended to secure the freest intercourse between the citizens of the different States. For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it

> without interruption, as freely as in our own States. And a tax imposed by a State for entering its territories or harbours is inconsistent with the rights which belong to the citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.

The case of Crandall v. *Nevada.*

In *Crandall* v. *Nevada* (1867), 6 Wall. 35, it was held that a law of the State of Nevada levying a tax upon every person leaving the State was unconstitutional. The opinion of the court was delivered by Mr. Justice Miller. After discussing two provisions of the Constitution of the United States claimed to be applicable, viz, that forbidding a State to lay a duty on exports, and that conferring power on Congress to regulate interstate commerce (6 Wall. 40–43), and pointing out the difficulty of holding that the statute of Nevada violated either, *he placed the judgment of the court* on the following principles (6 Wall. 43–45):

> But we do not concede that the question before us is to be determined by the two clauses of the Constitution which we have been examining.
>
> The people of these United States constitute one Nation. They have a Government in which all of them are deeply interested. This Government has necessarily a Capital estab-

lished by law, where its principal operations are conducted. Here sits its Legislature, composed of Senators and Representatives, from the States and from the people of the States. Here resides the President, directing through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the Nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal Government. That Government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right can not be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. The Government, also, has its offices of secondary importance in all other parts of the country. On the seacoasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its subtreasuries. In all these it demands the services of its citizens and is entitled to bring them to those points from all quarters of the Nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the Government was established.

The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union.

If this right is dependent in any sense, however limited, upon the pleasure of a State, the Government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the Treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory.

But if the Government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the subtreasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the States, as its exer-

> cise has affected the functions of the Federal Government, has been repeatedly considered by this court, and the right of the States in this mode to impede or embarrass the constitutional operations of that Government, *or the rights which its citizens hold under it*, has been uniformly denied. [Italics ours.]

This case has been referred to by this court in later cases with full approval, and undoubtedly represents the settled law. Since we claim that it is on principle decisive of the case at bar, certain objections which have been, or may be made to its authority here, may properly be considered at this place.

1. *The claim that an unlawful departation from the State is different from a burden upon or a prevention of leaving it.*

Unless every authority must be a "green-bottle" case, there seems to be nothing in this claim. The rights of a citizen of the United States, as stated in the quotation given above, and especially the right to free ingress and egress to and from a State, necessarily include the right of a citizen to determine for himself the time when and the circumstances under which he will enter or leave a State. To coerce his will and actions so as to compel his movements from the State at the will of third persons must be just as much an interference with his rights as a citizen of the United States as to place a burden upon or to coerce his will and actions so as to prevent or impede his leaving the State. If the one be a right secured to him by the Constitution and laws of the United

States (as this court held it was in *Crandall* v. *Nevada*), it follows necessarily that the other must be equally so. Indeed, merely to make a man pay money for leaving the State seems a less serious violation of his constitutional rights than by mob violence to drive him wholly from its territory and to prevent his return.

2. *The claim that Crandall* v. *Nevada is based upon an interference by the State with the operations of the Federal Government.*

This is the explanation of the case given by the court below (R. 24, 25; 254 Fed. 616, 617). We submit, with all respect to the distinguished judge, that such a reading of the case fails to give due effect to the broad, constitutional principles which this court clearly intended to establish, and to the subsequent decisions of this court referring to and approving *Crandall* v. *Nevada*. As has been stated above, this court expressly disclaimed that it was placing its decision on the power of Congress to regulate interstate commerce. In so far as the view of the court below is concerned, viz, that the case is based on State interference with the operations of the Federal Government, this is derived by Judge Morrow solely from the fact that Mr. Justice Miller cited (6 Wall. 45–48) certain cases decided upon the basis of such interference. This he did, not for the reason assumed by the court below, viz, that they were exactly in point *on their facts* with the case of *Crandall* v. *Nevada*, but because they were decided by the application of general principles as to the

constitutional powers and duties of the Federal Government which were equally applicable to the case of *Crandall* v. *Nevada*. This he expressly stated in the last paragraph of the quotation given above in which he prefaced his citation of the authorities referred to by the court below by the statement that the point involved in *Crandall* v. *Nevada* was the right of the States to impede or embarrass the operations of the Federal Government, "*or the rights which its citizens hold under it.*" That this statement was exactly correct can be seen from the following considerations. The United States is not a philosophical abstraction postulated merely to make a basis for constitutional law. It is a living fact of the most vital importance to the lives of men. As such a living fact its most essential element is its citizens. It is they who give it action; breath to its lungs, motion to its limbs, mind for its decisions. Unless *they* have freedom to move, expand, increase their useful activities, the political body of which they are the members will inevitably decay and die. Therefore any interference with them *in their relations toward the Federal Government* is not merely equivalent to an interference with that Government itself; it is the same thing as such interference. But every citizen of the United States, as a practical matter, has a dual status. He is a citizen of a State, as well as a citizen of the United States. There may, therefore, be interferences with his rights which affect, not his relations to the Federal but his relations to the State government, and over which

consequently the former would have no constitutional jurisdiction. Now, the right of a citizen to territorial mobility is, *as a general thing* (that is, leaving out of view mobility directly connected with Federal functions within the States, e. g., attending Federal courts of justice, paying Federal taxes, etc.), a matter only of State concern. But when the State itself, whose sovereignty and the operation of whose laws is coextensive with its territorial limits, enacts a statute attempting to regulate or determine the lawful movements of citizens of the United States, the effect of such action, if valid, must *necessarily* be to regulate or determine such movements with reference to State lines, and hence to impede or prevent the freedom of movement of the citizens concerned *to or from the State*. In the case of conspiracy by individuals covered by section 19, Criminal Code, this would not necessarily be the case, and hence it is essential in an indictment under that section to allege that the intent and object of the conspiracy was to interfere with the movements of a citizen *to or from the State*, an element (as we have said) implied necessarily where action by the State is involved. These are the considerations which were in the mind of this court in its decision in *Crandall* v. *Nevada*, as is clearly shown by the quotation given above from its opinion, and is shown by the manner in which the case has been referred to in subsequent authorities. To put it briefly, *Crandall* v. *Nevada* (we claim) squarely decides that a citizen

of the United States has, as such, a right, secured to him by the Constitution of the United States, to free ingress and egress *to and from a State.*

Crandall v. *Nevada* has always been referred to and its principles approved as a case depending on the rights secured by the Constitution to a citizen of the United States. Justice Miller himself so comments on it in his lectures on the Constitution, page 294. In the *Slaughter House Cases* (1872), 16 Wall. 36, 79, 80, this court said:

> But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal Government, its national character, its Constitution, or its laws.
>
> *One of these is well described in the case of Crandall* v. *Nevada.* It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States." And quoting from the language of Chief Justice Taney in another case, it is said "that for all the great

purposes for which the Federal Government was established, we are one people, with one common country, we are all citizens of the United States"; *and it is, as such citizens, that their rights are supported in this court in* *Crandall* v. *Nevada.*

Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign Government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. *One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State.* To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered. [Italics ours.]

In *Twining* v. *New Jersey* (1908), 211 U. S. 78, 97, 98, Mr. Justice Moody, delivering the opinion of the court, said:

> Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. (*Slaughter-House Cases, supra*, p. 79; *In re Kemmler*, 136 U. S. 436, 448; *Duncan* v. *Missouri*, 152 U. S. 377, 382.)
>
> *Thus among the rights and privileges of national citizenship recognized by this court are the right to pass freely from State to State* (*Crandall* v. *Nevada*, 6 Wall. 35); the right to petition Congress for a redress of grievances (*United States* v. *Cruikshank, supra*); the right to vote for national officers (*Ex parte Yarbrough*, 110 U. S. 651; *Wiley* v. *Sinkler*, 179 U. S. 58); the right to enter the public lands (*United States* v. *Waddell*, 112 U. S. 76); the right to be protected against violence while in the lawful custody of a United States marshal (*Logan* v. *United States*, 144 U. S. 263); and the right to inform the United States authorities of violation of its laws (*In re Quarles*, 158 U. S. 532). Most of these cases were indictments against individuals for conspiracies to deprive persons of rights secured by the Constitution of the United States, and met with a different fate in this court from the indictments in *United States* v. *Cruikshank* and *Hodges* v. *United States*, because the rights in the latter

cases were rights of State and not of national citizenship. [Italics ours.]

In Cooley's Principles of Constitutional Law, pages 245, 246, the learned author says:

> The line of distinction between the privileges and immunities of citizens of the United States and those of citizens of the several States must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of their respective Governments. A citizen of the United States as such has a right to participate in foreign and interstate commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, *and to pass from State to State, and into foreign countries*, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws. These, therefore, are among the privileges of citizens of the United States. So every citizen may petition the Federal authorities which are set over him in respect to any matter of public concern; may examine the public records of the Federal jurisdiction; may visit the seat of Government without being subjected to the payment of a tax for the privilege; may be purchaser of the public lands on the same terms with others; may participate in the Government if he comes within the conditions of suffrage; and may demand the care and protection of the United States when on the high seas, or within the jurisdiction of a foreign

> Government. The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to Federal citizenship. [Italics ours.]

In so far as a point may be made, viz, that in *Crandall* v. *Nevada* the action complained of was by the State itself, whereas in the case at bar it is by individuals, it is equally without basis as a ground for distinguishing *Crandall* v. *Nevada* from the case at bar. If the right be one secured by the Constitution of the United States, Congress may unquestionably protect it against action by individuals, as well as against action by the State, if it deem the former mode appropriate to the end. This is decided in *Prigg* v. *Pennsylvania*, *supra*. The fourteenth amendment has not made any difference in this respect. It expressly banned State action, but it did not limit the general and original power of Congress to protect rights secured by the Constitution in such manner as it thought most effective. This is proved by the case of *Crandall* v. *Nevada* itself, which arose prior to the fourteenth amendment and can therefore derive no assistance from its provisions. The fact that only State action was before the court in that case proves nothing as to the question whether a right of a citizen is secured under the Constitution only against State action. Indeed, the fallacy of the argument is shown by all the decisions which have

held section 19, Criminal Code, constitutional. Particular reference may be made to the statement of this court in *United States* v. *Reese* (1875), 92 U. S. 214, 217, because that case arose when the fourteenth amendment was a recent event:

> Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.

AUTHORITIES AFTER THE FOURTEENTH AMENDMENT.[1]

In the *Slaughter House Cases* (1875), 16 Wall. 36, it was held that the privileges and immunities of a citizen of the United States do not extend to or include the fundamental rights of a person to life, liberty, etc. As to what such privileges and immunities are, reference is made to the quotation given above from the opinion of the court. We call especial attention, however, now to the statement of the court

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[1] *Chronological table of relevant events.*

Article XIII of amendments	Dec.	18, 1865
First civil rights act (secs. 1977, 1978, 1979, R. S.)	Apr.	9, 1866
United States v. *Rhodes*, 1 Abbott, 28, declaring acts constitutional (see also 109 U. S., p. 22)		1866
Crandall v. *Nevada*		1867
Fourteenth amendment	July	23, 1868
Fifteenth amendment	Mar.	30, 1870
First enforcement act (sec. 19, Criminal Code), and second civil rights act	May	31, 1870
Supplemental enforcement act (R. S. 5519)	Apr.	20, 1871
United States v. *Reese* and *United States* v. *Cruikshank*		1875
United States v. *Harris*		1882
Civil Rights Cases		1883

that a citizen of the United States has a right specially secured under the fourteenth amendment to reside in a State for the purpose of acquiring citizenship therein; a right clearly violated in the case at bar. Since residence for a certain time may be necessary under the laws of the State to acquire citizenship therein (see *La Tourette* v. *McMaster*, 248 U. S. 465, 470; *Travis* v. *Yale & Towne Mfg. Co.*, *supra*), the provision in the fourteenth amendment on the subject would be ineffective if it did not secure to a citizen of the United States the right to take the steps necessary to make him eligible to State citizenship.

We also desire to quote a part of Justice Bradley's opinion in the *Slaughter House Cases*, for, though it is in a dissent, it deals with principles on which he did not differ from the majority. He said (16 Wall. 112, 113):

> A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein and an equality of rights with every other citizen; and the whole power of the Nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation and a more prosperous one than we now are.

In *United States* v. *Reese* (1875), 92 U. S. 214, it was held that sections 3 and 4 of the first enforcement act of May 31, 1870, in effect punishing election officers for obstructing citizens in the doing of any act required to qualify them to vote at any election, was unconstitutional as not being confined to disqualifications on account of race, etc. (See also *James* v. *Bowman* (1903), 190 U. S. 127.)

In *United States* v. *Cruikshank* (1875), 92 U. S. 542, section 6 of the first enforcement act of May 31, 1870 (now sec. 19, Criminal Code), was first brought to the attention of this court. Clearly, no doubt was felt as to the power of Congress to punish individuals who violated rights secured under the Constitution of the United States, whether State action was involved or not. It was held, however, that the rights set up in the various counts of the indictment, being all merely fundamental rights of citizens or persons generally and not peculiarly of citizens of the United States, were not secured by the Constitution of the United States. In delivering the opinion of the court, the Chief Justice said (92 U. S. 552, 553):

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peacably for con-

> sultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such however, is not the case. The offence, as stated in the indictment, will be made out; if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

In *Strauder* v. *West Virginia* (1879), 100 U. S. 303, and in *Ex parte Virginia* (1879), 100 U. S. 339, it was held that State statutes, or actions of State officials which denied the Negro right to sit on a grand jury were contrary to the fourteenth amendment; but the cases throw no additional light on the privileges and immunities of citizens of the United States.

In *Ex parte Siebold* (1879), 100 U. S. 371, it was held that certain provisions of the enforcement act of May 31, 1870 (R. S. 5515, 5522), dealing with frauds and unlawful interference by State election officers at elections for Representatives in Congress, were constitutional. The main point discussed was the right of Congress to regulate and punish State officers, as to which the remarks quoted above from the opinion of the court were made. The right of Congress to regulate elections for Federal officers, though held in the States by State officials at the same time as elections for State officers, was sus-

tained as beyond doubt. In *Ex parte Yarbrough* (1883), 110 U. S. 651, the principle of the prior case was extended and it was held that the right to vote for Federal officers was a right secured by the Constitution of the United States within the meaning of Revised Statutes 5508 (sec. 19, Criminal Code). Mr. Justice Miller, delivering the opinion of the court said (110 U. S. 663, 664):

> But it is not correct to say that the right to vote for a Member of Congress does not depend on the Constitution of the United States.
>
> The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election.
>
> Its language is:
>
> "The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." (Art. I, sec. 2.)
>
> The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures do not do this with reference to the election for Members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State. It adopts

> the qualification thus furnished as the qualification of its own electors for Members of Congress.
>
> It is not true, therefore, that electors for Members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right depend exclusively on the law of the State.

And again (as against the argument of the circuit judge in the case at bar that State action is necessary), he said (110 U. S. 665, 666):

> The reference to cases in this court in which the power of Congress under the first section of the fourteenth amendment has been held to relate alone to acts done under State authority can afford petitioners no aid in the present case. *For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the Government itself.*
>
> But it is a waste of time to seek for specific sources of the power to pass these laws. Chancellor Kent, in the opening words of that part of his commentaries which treats of the Government and constitutional jurisprudence of the United States, says:
>
> "The Government of the United States was created by the free voice and joint will of the

> people of America for their common defense and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness." (1 Kent's Com. 201.) [Italics ours.]

In *Wiley* v. *Sinkler* (1900), 179 U. S. 58, and in *Swafford* v. *Templeton* (1902), 185 U. S. 487, it was held that an action against an election officer for damages for rejecting plaintiff's vote for Member of Congress was a case arising under the Constitution of the United States. In *United States* v. *Mosley* (1915), 238 U. S. 383, the doctrine of the *Yarbrough Case, supra,* was extended, and it was held that a citizen had a right secured by the Constitution of the United States, not merely to cast his vote for Federal officers, but to have his vote counted. The court said (238 U. S. 386):

> We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in the box.

In *United States* v. *O'Toole* (1917), 243 U. S. 476, 485–489, it was held that candidates for Federal office did not have a right secured by the Constitution of the United States to have only qualified voters vote

at a primary held under the laws of West Virginia because of the peculiar and special character of those laws which had never been sanctioned or adopted by Congress. In *United States* v. *Bathgate* (1918), 246 U. S. 220, it was held that, whether candidates or qualified voters at elections for Federal officers had a right secured by the Constitution of the United States to a fair and honest election generally, or not, such right was not within the true meaning of section 19, Criminal Code, since the history of the section and the policy of Congress toward elections showed that the intention of the latter did not extend beyond the personal right to vote. The case can not be deemed an authority against the claim of the United States in the case at bar, since it does not purport to limit generally the rights of citizens of the United States, but only their rights in regard to elections. It in no way qualifies or disputes the decision of the court in *United States* v. *Mosley, supra,* expressly affirming that section 19, Criminal Code, as a general thing, covers broadly *all* rights secured to a citizen by the Constitution.

In *United States* v. *Harris* (1882), 106 U. S. 629, this court had under consideration section 5519, Revised Statutes (sec. 2 of the second enforcement act of April 20, 1871, 17 Stat. 13). This section (likewise aimed at the Ku Klux Klan) has a superficial resemblance to section 6 of the original enforcement act of May 31, 1870, ch. 114, 16 Stat. 141 (sec. 5508, R. S.; sec. 19, Criminal Code), but the difference between the two is (we think) fundamental and most

important in respect to the case at bar. Section 5519, Revised Statutes, punished a conspiracy to deprive *any person or class of persons*

> of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or * * * for the purpose of in any manner impeding * * * the due course of justice in any State * * * with intent to deny to any citizen of the United States the due and equal protection of the laws.

Section 5508, Revised Statutes (sec. 19, Criminal Code), on the contrary, is specifically confined to injuries to the free exercise of a right secured *to a citizen* by the Constitution of the United States. Section 5519, Revised Statutes, therefore, would reach and control the internal affairs of a State, while section 5508, Revised Statutes (sec. 19, Criminal Code), in so far as its relation to the case at bar is concerned, would reach and control only *interstate* relations affecting *citizens* of the United States.

The indictment in the *Harris Case* alleged a violation of section 5519, Revised Statutes, *supra*, in that the defendants, with intent to deny the rights of a citizen of the United States to the equal protection of the laws, had prevented the constituted authorities of the State of Tennessee from retaining him in custody on a State criminal charge, by forcibly taking him from the State officials and lynching him. It

was held that section 5519, Revised Statutes, was unconstitutional. While the opinion of the court dealt more particularly with the thirteenth, fourteenth, and fifteenth amendments, it must have been held, of course, that a citizen of the United States has no right secured by the Constitution of the United States to be protected from lynching or murder, such a right being one of that fundamental character which has been held in the *Slaughter House Cases, supra*, to be secured merely by the Constitution and laws of the several States. (See 106 U. S. at pp. 643, 644.) In *Hodges* v. *United States* (1906), 203 U. S. 1, there was an indictment based on section 5508, Revised Statutes (sec. 19, Criminal Code), which alleged the right secured by the Constitution to be the right to work without discrimination on account of color. Most of the opinion of the court and of the dissent was devoted to a discussion of the thirteenth amendment; whether the right to work was a necessary attribute of the free personal status established by that amendment; but in so far as the general rights of a citizen of the United States are concerned, the court said (203 U. S. 14):

> That prior to the three post-bellum amendments to the Constitution the National Government had no jurisdiction over a wrong like that charged in this indictment is conceded.

That is, the right to work, no matter what the worker's color, beliefs, etc., is not secured by the Constitution of the United States. In *United States* v. *Powell* (1909), 212 U. S. 564, a case in some respects

like *United States* v. *Harris*, supra, was again presented, but now it was attempted to base the right not to be taken from the State authorities and lynched on account of one's color on section 5508, Revised Statutes (sec. 19, Criminal Code), it being claimed that the right was secured by the fourteenth amendment even against actions of individuals as being undue process of law and unequal protection of the laws. This court held otherwise on the authority of *Hodges* v. *United States*, *supra*. That is, the right not to be lynched on account of one's color, like the right not to be prevented from working on that account, is fundamental and general, secured merely by State constitutions and laws.[1] Neither the *Harris*, *Hodges*, nor *Powell Cases* decides or intimates anything contrary to the claim of the United States in the case at bar. We admit that once a citizen of the United States *freely* enters the territory of a State, thereby subjecting himself to the scope of the operation of its laws; and so long as he *freely* abides within such territory, he trusts and must trust for the protection of his life and liberty generally to the laws and agencies of that State. It is an entirely and fundamentally different thing under the Constitution of the United States to say that he trusts and must trust his right freely to enter the territory of the State and subject himself to its laws; or freely to determine whether he shall remain there subject to

[1] Compare with *United States* v. *Harris* and *United States* v. *Powell*, *supra*, the case of *United States* v. *Shipp*, 203 U. S. 563, where a person was taken from the custody of the sheriff and lynched after a justice of this court had issued a habeas corpus.

its laws, solely to the jurisdiction of the State. No such right as the latter was before this court in the three cases referred to above.

With the cases of *Harris* and *Powell*, *supra*, should be contrasted the case of *Logan* v. *United States* (1892) 144 U. S. 263, where the citizen concerned was taken by the mob from the custody of a United States marshal, and it was held that he was thereby injured in a right secured to him by the Constitution of the United States. Mr. Justice Gray, who delivered the opinion of the court, after citing and fully discussing all the previous authorities, said (144 U. S. 293, 294, 295):

> The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and can not therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object. * * *

> In the case at bar, the right in question does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a National Government, paramount and supreme within its sphere of action. Any government which has the power to indict, try, and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them. * * *
>
> The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense.

In *United States* v. *Waddell* (1884), 112 U. S. 76, it was held that the right to make a homestead entry and to reside thereon was a right secured by the Constitution and laws of the United States. Mr. Justice Miller, delivering the opinion of the court, said (112 U. S. 80):

> The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws

> of the State and by its courts. But it is something different from that. It is the right to remain on the land in order to perform the requirements of the act of Congress, and, according to its rules, perfect his incipient title.
>
> Whenever the acts complained of are of a character to prevent this, or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it, or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such a statute.

In *In re Quarles* (1894), 158 U. S. 532, it was held that the right to inform of a violation of Federal laws was secured to a citizen by the Constitution of the United States. Mr. Justice Gray, delivering the opinion of the court, said (158 U. S. 536):

> The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a National Government, paramount and supreme within its sphere of action. (*United States* v. *Logan*, 144 U. S. 294.) Both are, within the concise definition of the Chief Justice in an earlier case, "privileges

> and immunities arising out of the nature and essential character of the National Government, and granted or secured by the Constitution of the United States." (*In re Kemmler*, 136 U. S. 436, 448.)

A similar decision was made in *Motes* v. *United States* (1900), 178 U. S. 458. (See pp. 462, 463.)

In *Baldwin* v. *Franks* (1886), 120 U. S. 678, it was charged that a mob had driven certain Chinamen from the town of Nicolaus, in the State of California, contrary to the treaty with China. It was not charged, however, that it had driven them from the State itself. This court held that the case was not covered by section 5508, Revised Statutes (sec. 19, Criminal Code), since that section only applied to citizens. In *United States* v. *Patrick* (1893), 54 Fed. 338, 347, Judge (afterwards Justice) Jackson said of this case:

> If the party affected or injured by the conspiracy had been a citizen, it is clear that the offense charged would have been embraced by the provisions of said section. (Sec. 5508, R. S.; sec. 19, Criminal Code.)

With respect to the distinguished judge, we do not think this dictum correctly states the law as laid down by this court. But if the object of the conspiracy in *Baldwin* v. *Franks* had been to drive citizens of the United States wholly away from the territory of the State of California, we believe that the decision of this court would have been favorable to the jurisdiction of the United States; and, at any rate,

the statement of Judge Jackson quoted above shows clearly where he would have stood upon such an issue.

We submit that this abstract of the decisions of this court on the subject of the rights secured by the Constitution to a citizen of the United States shows not only that these rulings do not in any manner or to any extent limit or qualify the principles made the basis of the judgment in *Crandall* v. *Nevada*, *supra*, but that they reinforce that decision by the uniform and consistent opinions of this court that section 19, Criminal Code, constitutionally covers every right of a citizen of the United States, as such, whether it arise from some express provision of the Constitution, or whether it be implied in the very organization and healthy operations of the National Government which substituted for a mere league of States and a single State citizenship a real, vital Union based upon a citizenship of the United States.

CONCLUSION.

The present case raises for the determination of this court issues of great, lasting, and far-reaching importance in regard to the distribution of powers under the Constitution of the United States. Ever since the dawn of history tribes and States, or certain classes of their inhabitants, have resented with violence the presence among them of persons whose views, religious, political, or social, were displeasing to them. One of the strongest claims for civilization is that it tends to do away with intolerance as between different political

bodies or their inhabitants. Remnants of such sectional, tribal feelings prevailed, as our records show, between the thirteen States prior to the Constitution. Undoubtedly it was the hope of the great statesmen who drew that document and of the people who established the Government under it that they had created a national body corporate whose existence and powers, if they would not entirely destroy or prevent such dangerous intolerance of one State or a class of its inhabitants toward the other States or their inhabitants, would at least, to use Lincoln's phrase anent slavery, "put it in the course of ultimate extinction." For this purpose they created a citizenship of the United States and secured its rights by the Constitution. Even thus, owing to the necessities of compromise, the evil was not fully met, and a civil war, with its consequent painful reconstruction, was necessary to secure a national status of personal freedom, and a constitutional amendment enlarging and specifically defining citizenship of the United States. It is worthy of note that in the analogous matter of intolerance as to commerce, the subject was *fully* dealt with by transferring to the Federal Government power over such commerce as between the States, and by the decisions of this court vigorously sustaining and enforcing the national power.

The question now before this court is whether, the Constitution having established a National Government and a national citizenship, and the Civil War having cemented in blood its weak, jointless places, the rights of citizens, in so far as they relate to the

matter of interstate relations, are less securely and completely protected by the Constitution than the rights of commerce; whether the old condition, prevailing without sufficient check prior to the adoption of the Constitution, and likely to continue in the future if not sufficiently checked by that instrument, under which States or classes of their inhabitants expelled from their borders as anathema any person whose views or consequent actions were displeasing to them, subject to no restraint except that of the law of the State from which the injured persons were expelled, has not been remedied by a Constitution which bound the States into a National Union and made their citizens also citizens of the United States.

We affirm that it has, and therefore respectfully submit that the judgment of the court below should be reversed, and the case remanded with instructions to overrule the demurrers to the indictment.

R. P. STEWART,
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W. C. HERRON,
Attorney.

○

No. [redacted]68

APR 13 1920
JAMES D. MAHER,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HARRY C. WHEELER, *et al.*,
Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

Brief for Defendants in Error.

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No. 292.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HARRY C. WHEELER, *et al.*,
Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

Brief for Defendants in Error.

Statement.

This is a writ of error under the Criminal Appeals Act to review a judgment of the District Court of the United States for the District of

Arizona sustaining a demurrer to an indictment (Transcript of Record, p. 17). The indictment charged violation of Section 19 of the Criminal Code (*id.* p. 1), which is as follows:

> "Sec. 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

This section, taken from Section 5508 of the Revised Statutes, had its source in Section 6 of "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes", approved May 31, 1870 (16 Stat. 140).

The demurrer to the indictment was heard in the District Court before Circuit Judge Morrow, and as this Court accepts the interpretation of the indictment by the Court below and confines its review to the question of the construction of the statute involved (*United States* v. *Carter*, 231 U. S. 492, 493; *United States* v. *Miller*, 223 U. S. 599, 602), we set forth at length the interpretation which Circuit Judge Morrow placed upon the indictment in question (Transcript of Record, pp. 19-22):

"This case is known to the public as the 'Bisbee deportation case.' It involves an alleged conspiracy on the part of the defendants continuing from the first to and including the twelfth day of July, 1917, to deport from Bisbee, in the State of Arizona, two hundred and twenty-one persons to the State of New Mexico. The conspiracy was plainly a single act on the part of the defendants against all the persons to be deported, but for the purpose of classifying such persons with respect to their citizenship and liability to the selective draft, the indictment has been split up into four counts so as to charge the offense as a conspiracy directed against different classes of persons. This may be done subject to certain limitations. (United States *v.* Howell, 65 Fed. 402; Orth *v.* United States, 252 Fed. 568.) These four counts classify the persons against whom the conspiracy was directed as follows:

"In the first count the whole number of two hundred and twenty-one persons are described as citizens of the United States.

"In the second count twenty-five of this number of persons are described as citizens of the United States residing in but not citizens of the State of Arizona.

"In the third count one hundred and ninety-six of the persons mentioned in the first count are described as citizens of the United States and of the State of Arizona, residing in Arizona. There is also in this count a name not mentioned in the first count, making the number in this class one hundred and ninety-seven. No objection is made to the indictment on this account.

"In the fourth count sixty persons mentioned in the first count are described as citizens of the United States and of the State of Arizona, residing in said State, who were male persons between the ages of twenty-one and

thirty, required by the proclamation of the President of the United States, dated May 18th, 1917, to present themselves on June 5th, 1917, and who did present themselves for and submit to registration under the provisions of the act of Congress approved May 18th, 1917.

"It is alleged in the first count that the two hundred and twenty-one persons against whom the conspiracy of the defendants was directed 'were citizens of the United States, residing in the county of Cochise, in the State and in said district of Arizona, in the peace of said county, State, and district, and then and there as such citizens of the United States were exercising the right and privilege pertaining to citizens of said State peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another State of the United States, and the right and privilege pertaining to citizens of said State to be immune from unlawful deportation from that State to another State; and then and there were not persons charged in any State with treason, felony, or other crime, who had fled from justice of said State and had been found in said State of Arizona, or persons then in said State of Arizona who had committed crimes or offenses against the United States in another State, or in other States, or persons not sentenced or imprisoned in a prison or prisons located in another State or any other States or persons subject to extradition to a foreign country or foreign countries.'

"It is charged that the defendants conspired and confederated together 'to injure, oppress, threaten, and intimidate said citizens of the United States in the free exercise and enjoyment by them respectively of certain rights and privileges secured to them as such citizens by the Constitution and laws of the United States; that is to say, the rights and privileges aforesaid.' The rights and priv-

ileges 'aforesaid' were the 'right and privilege pertaining to citizens of the said State peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another State of the United States and the right and privilege pertaining to citizens of said State to be immune from unlawful deportation from that State to another State.' It is further charged that 'said unlawful and felonious conspiracy, combination, confederation, and agreement then and there was one for injuring, oppressing, threatening, and intimidating said citizens of the United States in the free exercise and enjoyment of said rights and privileges by unlawfully and with force and arms driving and conveying said citizens in a body from their said places of residence in said State of Arizona to and into another State, to wit, New Mexico, and threatening said citizens with great bodily harm and death if they should return or endeavor to return to said State of Arizona.'

"It is further charged that certain of the defendants in and for executing such conspiracy did certain overt acts set forth in the count.

"The second count is the same as the first count, except that it is alleged that the twenty-five persons against whom the conspiracy was directed are described as citizens of the United States residing in but not citizens of the State of Arizona who 'were exercising the right and privilege pertaining to citizens of other States of the United States other than said State of Arizona, peaceably there to reside and remain and to enjoy the blessings of liberty and the right and privilege of being immune from unlawful deportation from that State to another State.' The charge in this count is that the defendants conspired and confederated together 'to injure, oppress, threaten, and intimidate the citizens in this count named in the free exercise and enjoyment by them,

respectively, of certain rights and privileges, secured to them as such citizens by the Constitution and laws of the United States, that is to say, the rights and privileges in this count aforesaid.' The rights and privileges 'in this count aforesaid' are the rights and privileges 'pertaining to citizens of other States of the United States other than said State of Arizona peaceably there to reside and remain and enjoy the blessings of liberty and the right and privilege of being immune from unlawful deportation from that State to another State.'

"The third count is the same as the first count, except that it is alleged that the one hundred and ninety-seven persons therein named against whom the conspiracy of the defendants was directed, were citizens of the United States and of the State of Arizona.

"The fourth count is substantially the same as the first count, except that it is alleged that the sixty persons against whom the conspiracy was directed are described as 'citizens of the United States and of the State of Arizona residing in the county of Cochise, in said State, and in said district of Arizona, and were, respectively, male persons between the ages of 21 and 30, * * * who were then and there required by the proclamation of the President of the United States, dated May 18, 1917, to present themselves, and did present themselves for and submit to registration under the provisions of the act of Congress approved May 18, 1917, * * * at divers registration places in divers precincts, * * * these precincts being the precincts where the citizens mentioned in this count of this indictment had their permanent homes and actual places of legal residence.' Against these persons so subject to the selective draft it is charged that the defendants conspired 'to injure, oppress, threaten, and intimidate in the free exercise and enjoyment by them, re-

spectively, of the certain right and privilege secured to them as such citizens by the Constitution and laws of the United States, that is to say, the right and privilege in the count aforesaid. The right and privilege in the count aforesaid was 'the right and privilege pertaining to citizens who had presented themselves for, and who had submitted to registration as aforesaid, of remaining unmolested in their said permanent homes and actual places of legal residence subject to draft and until drafted under the provisions of said act of May 18, 1917, into the military service of the United States.'

"The act did not require registrants under the act to remain in their permanent homes and actual places of legal residence until drafted into the military service of the United States, nor did the selective service regulations prescribed by the President of the United States make such a requirement, but, on the contrary, the location of the registrant elsewhere than at his permanent home and actual place of legal residence at the time of his call into the military service was provided for in such regulations and the absence from home of the registrant in no way prejudiced his rights under the act or under the regulations of the President.

"Stripped of the verbiage required to state the various elements of the alleged conspiracy, we find that the injury charged in the four counts of the indictment may for the purpose of the present inquiry be reduced to the single charge of a conspiracy to injure, oppress, threaten, and intimidate certain citizens of the United States in the free exercise and enjoyment of the right and privilege pertaining to citizens of the State of Arizona, peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another State of the United States and the right and privilege pertaining to citizens of

said State to be immune from unlawful deportation from that State to another State.

"The offense which the defendants are charged to have conspired to commit is then an offense against the right and privilege of the persons conspired against secured to them as citizens of the State of Arizona, and upon examining the law of that State we find that the charge in the indictment is correct in both form and substance and that protection has been provided for such persons under the police power of the State. Section 186 of the Penal Code of the State of Arizona provides:

"'Every person who forcibly • • • takes • • • any person in this State and carries him into another • • • State • • • is guilty of kidnapping,' for which a punishment has been provided. Another aspect of the case is provided for in section 205 of the Penal Code, where it is enacted: 'False imprisonment is the unlawful violation of the personal liberty of another,' for which a punishment has been provided." (Italics ours.)

Circuit Judge Morrow carefully examined the decisions and concluded that the Federal statute was inapplicable (Transcript of Record, pp. 25-33).

Points.

It is unnecessary to review the history of Section 19 of the Criminal Code, as this has frequently been set forth in the opinions delivered in this Court.

United States v. *Cruikshank*, 92 U. S. 542;
United States v. *Gradwell*, 243 U. S. 476;
United States v. *Bathgate*, 246 U. S. 220.

The Government relies upon these words of the statute:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment *of* any right or privilege secured to him by the Constitution or laws of the United States * * *."

In support of the conclusion reached by the Court below, which we submit follows the clear distinction established by the decisions of this Court, we present the following points:

(1) There are two classes of rights enjoyed by citizens of the United States, as such, (a) rights by which one is entitled to protection merely against action by or on behalf of States where that action is in conflict with the provisions of the Federal Constitution, and (b) rights by which one is entitled to protection against the action of individuals. Section 19 of the Criminal Code is not concerned with the former, but exclusively with the latter.

(2) The right of a citizen of the United States to reside and work within the bounds of the United States wherever he may choose is a fundamental right pertaining to his individual liberty. Like other fundamental rights of life, liberty and property, so far as interference therewith on the part of individuals is concerned, it is a right which the Constitution of the United States leaves to the protection of the several States having jurisdiction. So far as there is a right pertaining to Federal citizenship to have free ingress or egress with respect to the several States, the right is essentially one of protection against the action of

the States themselves and of those acting under their authority.

(3) The provision of subdivision 1 of Section 2 of Article IV of the Constitution that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" does not confer a right of protection against the acts of individuals, but is aimed at the hostile action of the States.

(4) The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a Federal right to protection as against the action of individuals in the absence of action by a State.

(5) If it be assumed that, apart from Section 2 of Article IV and the Fourteenth Amendment, there is an inherent Federal right of a citizen of the United States freely to cross the boundary of a State, it is of the essence of that right that it is one which exists only with respect to action by the States and their agencies. So far as mere individual liberty is concerned, in the absence of action by the States, the State boundary has no significance.

It follows therefore that as Section 19 only applies to those cases where there are rights protected by the Federal Constitution and laws as against individual action, it has no application to this case.

ARGUMENT.

FIRST:—There are two classes of rights enjoyed by citizens of the United States, as such, (a) rights by which one is entitled to protection merely against action by or on behalf of States where that action is in conflict with the provisions of the Federal Constitution, and (b) rights by which one is entitled to protection against the action of individuals. Section 19 of the Criminal Code is not concerned with the former, but exclusively with the latter.

The Government predicates its case upon what it calls the narrow question whether the indictment "sufficiently charged a right secured to a citizen by the Constitution and laws of the United States", but it is apparent at the outset that it is not sufficient for the Government to merely assert a Federal right. There are many Federal rights, that is, rights secured by the Constitution of the United States, which Section 19 does not protect. It is idle to stress the word "*right*", and at the same time to ignore what the word "right" connotes. We come at once to the historic distinction between Federal rights which protect the citizen simply against State action, and Federal rights which protect the citizen against the action of individuals. It is this distinction, abundantly established by the decisions of this Court, which, as we view it, has been disregarded in this prosecution.

Thus, the citizen of the United States may enjoy by virtue of his citizenship the right to be secure in his personal liberty and possessions as against deprivation without due process of law, but it is a right with which Section 19 is not concerned, for

"*right*" in this case connotes freedom from the action of the States and their agencies. Whether a right belongs in one or the other category must always be determined before Section 19 can be applied.

The provision of Section 19, then Section 6 of the Enforcement Act of May 31, 1870, first came before this Court for construction in *United States* v. *Cruikshank*, 92 U. S. 542. The case was one of indictment for conspiracy, and disregarding the details of the charges, it was alleged in substance that the defendants had conspired to injure, oppress and intimidate certain persons of African descent in various ways, viz: By hindering them in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceable and lawful purpose"; by interfering with their right "of bearing arms for a lawful purpose"; by intending to deprive them "of their respective several lives and liberty of person without due process of law"; by interfering with "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States", etc. "When stripped of its verbiage", the case seemed to this Court to be one which presented "nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States."

In the course of its opinion, the Court said: (*id.* pp. 554, 555).

"The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society" * * *.

"The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; *but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another.* The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." (Italics ours.)

The distinction thus clearly pointed out in the *Cruikshank* case was re-affirmed in *Virginia* v. *Rives*, 100 U. S. 313, 318, where it was said:

"The provisions of the Fourteenth Amendment of the Constitution we have quoted *all have reference to State action exclusively, and not to any action of private individuals.* It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the

amendment, are intended for protection against State infringement of those rights. Sect. 641 was also intended for their protection against State action, and against that alone." (Italics ours.)

Again, in *United States* v. *Harris*, 106 U. S. 629, 639, in speaking of the operation of the Fourteenth Amendment, the Court said:

"The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

The doctrine was re-stated in the *Civil Rights Cases*, 109 U. S. 3, 11-13:

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. • • •

• • • *Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges,* and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State

laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States* v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313; and *Ex parte Virginia*, 100 U. S. 339. * * *

"And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. *Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society.* It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment,

therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character." (Italics ours.)

See also,

James v. *Bowman*, 190 U. S. 127;
Barney v. *City of New York*, 193 U. S. 430;
Hodges v. *United States*, 203 U. S. 1;
Karem v. *United States*, (C. C. A. 6th Circ.), 121 Fed. 250;
United States v. *Moore*, 129 Fed. 630;
United States v. *Powell*, 151 Fed. 648, affirmed 212 U. S. 564.

The recent case of *Hodges* v. *United States*, *supra*, shows very clearly the distinction between the two classes of rights and the accepted principle by which Section 19 applies only to those cases where the Federal right is one of protection not simply against the action of States, but against the action of individuals. In the *Hodges* case the indictment under Sections 1977 and 5508 of the Revised Statutes (the latter now Section 19 of the Criminal Code) charged a conspiracy to oppress,

threaten and intimidate certain persons of African descent for the purpose of compelling them by violence and threats to remove from the place of business where they were employed and to abandon the contracts under which they were working and which they had made, as alleged, in the exercise of their constitutional rights. This Court remanded the case with instructions to sustain the demurrer to the indictment, and held that the right asserted was one secured by the Constitution as against State action, and not as against the conspiracies of individuals in the absence of State action. The Court said (203 U. S. pp. 14-16):

> "That prior to the three *post bellum Amendments* to the Constitution the National Government had no jurisdiction over a wrong like that charged in this indictment is conceded; that the Fourteenth and Fifteenth Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the State is complained of. Unless, therefore, the Thirteenth Amendment vests in the Nation the jurisdiction claimed, the remedy must be sought through state action and in state tribunals subject to the supervision of this court by writ of error in proper cases.
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> "In the *Slaughter House Cases*, 16 Wall. 36, 76, in defining the privileges and immunities of citizens of the several States, this is quoted from the opinion of Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. Cir. Ct. 371, 380.
>
> "'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation is confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the

citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several States which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads; protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole.'

"And after referring to other cases this court added (p. 77):

"'It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent Amendments no claim or pretence was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States —such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government.'

"Notwithstanding the adoption of these three Amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment, which reads 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,' is not shorn of its vitality. True the Thirteenth Amendment grants cer-

tain specified and additional power to Congress, but any Congressional legislation directed against individual action which was not warranted before the Thirteenth Amendment must find authority in it."

It thus conclusively appears that it is not enough for the Government to establish that there is a Federal *right*, in order to invoke Section 19, if it appears, as we submit it does clearly appear in the present case, that the right is of that class which connotes protection only against State action.

The decisions may be searched in vain for any authoritative precedent applying Section 19, unless there is a right to protection as against individual action and not simply as against State action. The following cases show the manner in which Section 19 has been applied:

In *Ex parte Yarbrough*, 110 U. S. 651; *Guinn v. United States*, 238 U. S. 347; *United States v. Mosley*, 238 U. S. 383; *United States v. Butler*, Fed. Cas. No. 14,700; *United States v. Crosby*, Fed. Cas. No. 14,893; *Felix v. United States*, 186 Fed. 685; *United States v. Stone*, 188 Fed. 836; and *Aczel v. United States*, 232 Fed. 652, the right of citizens to vote for members of Congress was involved. This right is secured by Section 1 of Article I of the Constitution, creating the Congress, and by Section 2 of the same Article, providing for the election of members of the House of Representatives. But for these Constitutional provisions, there would be no Congress, no Congressional elections, and consequently no right to vote at such elections.

In *United States v. Waddell*, 112 U. S. 76; *Haynes v. United States*, 101 Fed. 817; and *Buchanan v. United States*, 233 Fed. 257, there

was involved the right of citizens to enter upon the public lands of the United States, to make settlements thereon, and to do the acts necessary to make such entries effectual under the public land laws of the United States. This right is secured by Section 1 of Article I of the Constitution, vesting all Federal legislative powers in Congress, and by Section 3 of Article IV of the Constitution, giving Congress power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. But for these constitutional provisions, there would be no public land laws, and consequently no right to claim any benefits thereunder.

In *Logan v. United States*, 144 U. S. 263, the indictment charged a conspiracy against the right of a citizen, while a prisoner in the custody of a United States marshal, and charged with a Federal offense, to be protected from unlawful violence and murder. This right is secured by Section 1 of Article I of the Constitution, vesting all Federal legislative powers in Congress, and Section 8 of the same Article, empowering Congress to make all laws necessary and proper for carrying into execution the Federal powers enumerated in the Constitution, and by Section 2 of Article II of the Constitution, providing for the nomination and appointment of Federal officers, and by Section 1 of Article III of the Constitution, vesting the judicial power of the United States in the Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish, and by Section 2 of the same Article, defining the judicial power of the United States, and providing for the trial and punish-

ment of Federal offenders. But for these constitutional provisions, there would be no Federal offenses, no Federal prisoners, no marshals to have custody of such prisoners, and consequently no right of any such prisoner to be protected from violence while in such custody.

In re Quarles, 158 U. S. 532, and in *Motes v. United States*, 178 U. S. 458, the right involved was the right of citizens to go before the proper Federal officers and inform against persons who had violated the Internal Revenue Laws of the United States. This right is secured by Section 1 of Article I of the Constitution, vesting all Federal legislative powers in Congress, and by Section 8 of the same Article, empowering Congress to levy and collect taxes, duties, imposts and excise, and to make all laws necessary and proper for carrying into execution the power so granted, and by Section 2 of Article II of the Constitution, providing for the nomination and appointment of Federal officers, and by Section 1 of Article III of the Constitution, vesting the judicial power of the United States in the Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish, and by Section 2 of the same Article, defining the judicial power of the United States, and providing for the trial and punishment of Federal offenders. But for these Constitutional provisions, there would be no Internal Revenue Laws, no Federal officers to be informed of violations of such laws, and consequently no right to inform such officers of such violations.

In *United States v. Lancaster*, 44 Fed. 885, 896, the right conspired against was the right of a citizen to prosecute a contempt proceeding

against persons violating an injunction previously obtained by him in a Federal Court. This right is secured by Section 1 of Article III of the Constitution, vesting the judicial power of the United States in the Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish, and by Section 2 of the same Article, defining the judicial power of the United States, and clothing the Federal Courts with equity jurisdiction. But for these constitutional provisions, there would be no Federal Courts, no equity jurisdiction in such courts, no writs of injunction emanating therefrom, no violations of such writs of injunction, and consequently no right to prosecute a contempt proceeding against persons violating any such injunction.

In *United States v. Patrick*, 54 Fed. 338, and in *Davis v. United States*, 107 Fed. 753, the defendants had conspired against the right of citizens, who were marshals or deputy marshals of the United States, to arrest persons violating the Internal Revenue Laws of the United States. This right is secured by Section 1 of Article I of the Constitution, vesting all Federal legislative powers in Congress, and by Section 8 of the same Article, empowering Congress to levy and collect taxes, duties, imposts and excise, and to make all laws necessary and proper for carrying into execution the power so granted, and by Section 2 of Article II of the Constitution, providing for the nomination and appointment of Federal officers, and by Section 1 of Article III of the Constitution, vesting the judicial power of the United States in the Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish, and by Section 2 of the same Arti-

cle, defining the judicial power of the United States, and providing for the trial and punishment of Federal offenders. But for these constitutional provisions, there would be no Internal Revenue Laws, no marshals or deputy marshals to arrest persons for violating such laws, and consequently no right of any such officer to make such an arrest.

In *United States v. Morris*, 125 Fed. 322, the right in question was the right of negro citizens to lease and cultivate land. The Court held that this right was not secured by Section 2 of Article IV of the Constitution, within the meaning of Section 19 of the Criminal Code, for the reason that Section 2 of that Article is directed against State action, and not against the acts of individuals, but held that the right in question was secured by the Thirteenth Amendment to the Constitution, declaring that neither slavery nor involuntary servitude shall exist within the United States, or any place subject to their jurisdiction. The Court reasoned that, since incapacity to make contracts was one of the badges of slavery, a conspiracy to deprive one of his right to contract was, therefore, a conspiracy to deprive him of his right of freedom from slavery and involuntary servitude. This part of the decision is inconsistent with the later decision of this Court in *Hodges v. United States*, 203 U. S. 1. In the light of the decision in the *Hodges* case, it is now perfectly clear that the right dealt with in the *Morris* case was not secured by the Thirteenth Amendment, nor by any other provision of the Constitution, within the meaning of Section 19 of the Criminal Code.

In *Smith v. United States*, 157 Fed. 721, the right in question was the right to be free from slavery and involuntary servitude. This right is secured by the Thirteenth Amendment to the Constitution, declaring that neither slavery nor involuntary servitude shall exist within the United States, or any place subject to their jurisdiction, which Amendment is addressed, not to the States alone, but to every individual, as well as to every government, within the jurisdiction of the United States. But for this Constitutional Amendment, the right to be free from slavery and involuntary servitude, although it might exist as a natural right, or as a right of State citizenship, would not exist as a Federal right.

We believe that this completes the list of reported cases in which indictments under Section 19 of the Criminal Code have been finally held valid. As examples of prosecutions which have fallen by the wayside because of the prosecutor's inability to point out, to the satisfaction of the Court, the constitutional provision securing the right said to have been conspired against, we cite *United States v. Cruikshank*, 92 U. S. 542; *Hodges v. United States*, 203 U. S. 1; *United States v. Gradwell*, 243 U. S. 476; *Karem v. United States*, 121 Fed. 250; *McKenna v. United States*, 127 Fed. 88; *United States v. Eberhart*, 127 Fed. 254; *United States v. Moore*, 129 Fed. 630; *United States v. Powell*, 151 Fed. 643, affirmed in 212 U. S. 564.

A very recent and most striking example of this class of unsuccessful prosecutions may be found in *United States v. Bathgate*, 246 U. S. 220. The Government attempted in that case to utilize Section 19 of the Criminal Code for the

punishment of certain persons who were alleged to have conspired to bribe voters at an election where presidential electors, a United States Senator and a Representative in Congress were to be chosen. The indictment described this as a conspiracy to injure the candidates and all those legally voting at the election, in the free exercise and enjoyment of their right to have the election participated in only by those legally qualified to vote, and to have the results determined by voters who had not been bribed, and to have the election board make a true and accurate return of votes legally cast by qualified electors, and no others. The Government contended that the right there in question was "included in the general right of suffrage," and was "deducible" from the decisions recognizing the right of suffrage. There, as here, counsel argued that Section 19 of the Criminal Code applies to all Federal rights "and protects all without limit." Then, as now, they asserted that the right in question was "implied as essential to the existence of the Government."

This Court remarked that the reasoning thus employed by counsel for the Government "would apply in respect of almost any act reprehensible in itself, or forbidden by state statutes, and supposed injuriously to affect the freedom, honesty or integrity of an election." The Court further stated that the proper interpretation of Section 19 of the Criminal Code must be ascertained in view of the settled rule that "there can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute." The judgment of the lower Court sustaining a

demurrer to the indictment was accordingly affirmed.

SECOND:—The right of a citizen of the United States to reside and work within the bounds of the United States wherever he may choose is a fundamental right pertaining to his individual liberty. Like other fundamental rights of life, liberty and property, so far as interference therewith on the part of individuals is concerned, it is a right which the Constitution of the United States leaves to the protection of the several States having jurisdiction. So far as there is a right pertaining to Federal citizenship to have free ingress or egress with respect to the several States, the right is essentially one of protection against the action of the States themselves and of those acting under their authority.

In considering the right with which we are here concerned, we assume that we may disregard the fourth count of the indictment, based upon the Selective Service Law of May 18, 1917, as the Government does not appear to attach importance to this count, which is manisfestly without basis from any point of view. As Circuit Judge Morrow said:

> "The act" (referring to the Selective Service Law) "did not require registrants under the act to remain in their permanent homes and actual places of legal residence until drafted into the military service of the United States, nor did the Selective Service Regulations prescribed by the President of

> the United States make such a requirement, but, on the contrary, the location of the registrant elsewhere than at his permanent home and actual place of legal residence at the time of his call into the military service was provided for in such regulations and the absence from home of the registrant in no way prejudiced his rights under the act or under the regulations of the President." (Transcript of Record, p. 22).

The right alleged to have been violated in each of the first three counts of the indictment is described, to quote the language of Circuit Judge Morrow, as—

> "the right and privilege pertaining to citizens of the State of Arizona peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another State of the United States and the right and privilege pertaining to citizens of said State to be immune from unlawful deportation from that State to another State." (*id.* p. 22).

This right might, with more brevity, and as much accuracy, have been described simply as the right of *residence* within the State.

It would seem to be plain that the right of ingress or egress with respect to the State, as distinguished from the right of residence within the State, is not involved. There is no charge in the indictment that the persons whose right is alleged to have been violated or threatened were prevented from leaving the State of Arizona. The right alleged to have been violated is the right "to reside and remain" within the State.

It does not require argument to show that this right is the right simply to have one's abode where one wills. It is merely a phase of the right

of personal liberty. It is a right which would be just as much violated by taking a person against his will from Bisbee to Tucson, within the State of Arizona, as to take a person against his will from Bisbee to Chicago. It is a right which is quite as much impaired by unlawfully incarcerating a person in Bisbee, so that he could not move about at his pleasure, as by taking him outside the borders of that city. The distance to which one is removed does not qualify the offense of kidnapping. The fact that a State boundary is crossed by kidnappers in no way changes the nature of the interference with personal liberty.

It is apparent that if, under the Constitution of the United States, a citizen enjoys, as against individuals, the right to remain and reside where he wills, interference with the exercise of such a right would none the less exist if he were moved about against his will within the borders of a State. If one has a right under the Constitution of the United States to reside and work in the City of New York, it is just as much a violation of that right to compel him to remain in Utica as to send him to St. Louis. The essence of the right, the violation of which is here complained of, is the right not to move, but to stay, and to stay unmolested in the place of one's choice as his place of residence. Of course, if there is such a right as against individuals, enjoyed as a Federal right, and distinguished from the general right of life and liberty, then, of course, it is violated by any act on the part of an individual which amounts to false imprisonment, kidnapping or assault. It is a right which might even be violated by serious libels, which might compel one to leave his chosen place of residence. In other words, such a con-

ception of a right as against individuals, enjoyed as a Federal right, necessarily would place under Federal cognizance the entire field of personal liberty. We do not understand how it can be maintained that if a citizen of the United States, under the Federal Constitution, has a right to "reside and remain" in Bisbee, there will be no Federal redress for its violation in case he is kidnapped and taken to Phoenix, but that all the power of the Federal government attaches as soon as he is brought across the State boundary.

The counsel for the Government appear to appreciate the force of this point, as it is said in the Government's brief, as we understand the statement, that mere kidnapping will not constitute a violation of the constitutional right. It is also said that it is not enough that there should be a kidnapping "*the incidental effect* of which is to injure the constitutional right." The argument is that the constitutional right is invaded, not by the kidnapping or by the mere forcible removal of one from the place where he desires to "reside and remain", but that as soon as there is an *intent* to take the person kidnapped out of the State, the invasion of the Federal right takes place (Govt. brief p. 30). It is argued that, in order to violate the Federal right, "the purpose, intent and end of the conspiracy" must be to get the citizen out of the State. In this view, if there were a conspiracy to kidnap a citizen at Bisbee and take him to Tucson, there would be no invasion of the Federal right; and, if there were an intent to take him out of the State, the Federal right would be violated, even though he was actually left within the State. This argument, as it seems to us, discloses the difficulty which inheres in

the Government's position in attempting to maintain such a Federal right as against the action of individuals. It seems entirely to ignore the substance of the matter. If there is a right under the Federal Constitution, as against the action of individuals, to "reside and remain" anywhere that one chooses, it would seem to be clear that that right would be violated if one were compelled by the unlawful acts of individuals to reside and remain somewhere else. The right to reside and remain in the place of one's choice is a right essentially irrespective of any State boundary. The right to stay where one wills cannot be satisfied by permission to remain within the borders of a State. That right can only be satisfied by freedom and security at some particular place which one has chosen as his abode. And the notion that one may be kidnapped with impunity, so far as the Federal right is concerned, so long as there is no intent to carry him beyond the State boundary, but that the Federal right is violated as soon as there is an intent to take him outside the State, loses sight of the essence of the right to be free both with respect to residence and locomotion.

The introduction of the relation of the unlawful action to the State boundary, as the test of the Federal right, shows clearly that the Federal right, if it be defined in such a manner as not to constitute it the mere right of personal liberty as against individual wrongs, is nothing less than the right to be protected as *against the action of the State itself or of its agencies.*

Of course, the fact that a crime is begun in one State and consummated in another, whether directed at the life, liberty or property of the individual, in no way creates a ground

for Federal jurisdiction. Kidnapping is not a violation of a Federal right because one is taken out of the State, any more than murder involves a violation of a Federal right because the assailant is in one State and the victim in another. It might as well be said that there is a Federal right, under the Federal Constitution, to be free from molestation within a State by persons who are in another State. It is fundamental that one should be immune in his person from illegal assault, but the fact that the assault is committed across a State boundary raises no question of Federal right.

From whatever point of view the question is approached, it becomes evident that the essence of the right which is here asserted is the fundamental right of personal security. Undoubtedly this is guaranteed by the Constitution against State action. It is explicitly guaranteed by the Fourteenth Amendment against action on the part of the State, or of any agency of the State, but it has never been held, we submit, that it is guaranteed by the Federal Constitution as against the action of individuals. The contrary view, as has often been pointed out, would leave it to the Federal Government to establish step by step an entire code of municipal law relating to the rights of persons.

We may quote again what was said in the *Slaughter House Cases*, 16 Wall. 36, 76, quoting from the opinion of Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. Cir. Ct. 371, in defining the privileges and immunities of citizens of the several States:

> "We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of

> right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."

And it is only where the State undertakes to interfere with these rights that the Federal right, as distinguished from the fundamental right of life, liberty and property under the laws of the State, is infringed.

The Government does not contend that the right or privilege here asserted has been conferred by any act of Congress, but rests its contention upon the existence of the alleged right under the Constitution of the United States. There are only two express provisions of the Federal Constitution, which it can be said base the right contended for, and those are the provisions of subdivision 1 of Section 2 of Article IV, and of the Fourteenth Amendment. And whether we have regard to these, or to an alleged inherent right, we come to the same result.

THIRD:—The provision of subdivision 1 of Section 2 of Article IV that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" does not confer a right of protection against the acts of individuals, but is aimed at the hostile action of the States.

If the right of "ingress and egress" with respect to the several States existed under the Federal Constitution, prior to the Fourteenth Amendment, it finds its guaranty in the provisions of subdivision 1 of Section 2 of Article IV:

> "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

It is this clause which, perhaps more than any other clause, made the citizens of the United States one people. As was said in *Paul* v. *Virginia*, 8 Wall. 168, 180:

> "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; *it gives them the right of free ingress into other States, and egress from them;* it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so

> strongly to constitute the citizens of the United States one people as this." (Italics ours.)

It will be at once observed that in the opinion in *Paul* v. *Virginia* it is distinctly stated that it is this clause which gives to the citizens of the several States *"the right of free ingress into other States, and egress from them."* This right was involved in the fundamental conception of personal liberty. It was involved in the conception of the Union, of National rights as distinguished from State rights. In the presence of this clause, and of its authoritative exposition, it is not necessary to look elsewhere for the right of "ingress and egress" with respect to the several States.

And this statement in *Paul v. Virginia*, made in 1868, set forth no new doctrine. It merely reiterated the view of the content of subdivision 1 of Section 2 of Article IV as it had been conceived from the beginning. The statement in the *Slaughter House Cases*, already quoted, of the meaning of this provision was taken from the statement of Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. Cir. Ct. 371, 381. In defining the fundamental rights which were embraced within this provision, Mr. Justice Washington included—

> *"The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise;"* (Italics ours.)

This right of a citizen of one State "to pass through, or to reside in any other State" is obviously the right of "ingress and egress" asserted by the Government. In *Paul v. Virginia*, the right,

paraphrasing the words of Mr. Justice Washington, is described as "the right of free ingress into other States, and egress from them."

Again, in *Ward* v. *Maryland*, 12 Wall. 418, 430, it was said that beyond doubt the clause of Section 2 of Article IV "plainly and unmistakably secures and protects the right of a citizen of one State *to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation.*" (Italics ours.)

In the *Slaughter House Cases*, 16 Wall. 36, 75, it was pointed out that the words "*privileges and immunities*" first occur in our constitutional history in the fourth of the articles of the old Confederation. There it was distinctly declared that the "free inhabitants of each of these states" were to be entitled "to all privileges and immunities of free citizens in the several States; and the people of each state shall have *free ingress and regress* to and from any other state." This Court, by Mr. Justice Miller, referring to the corresponding provision in Section 2 of Article IV of the Constitution, said:

> "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each."

If then the right of "ingress and egress," as "one of the privileges and immunities", was protected first by the Articles of Confederation specifically, and the provision of Section 2 of Article IV connotes the same right, and it has been explicitly determined by this Court that the right of ingress and egress with respect to the several States is guaranteed by Section 2 of Article IV,

it would seem to be idle to ignore the nature of this right and to seek to establish by implication some other right of ingress and egress of a different nature.

We submit that, apart from the Fourteenth Amendment, with its guaranty of "privileges and immunities," we must look to Section 2 of Article IV as the source of the right in question, and that the nature of the right as defined under that Article must be accepted.

There is, however, no question but that subdivision 1 of Section 2 of Article IV, connoting the right of "ingress and egress" with respect to the States, confers no right whatever with respect to the action of individuals, but only affords protection as against the hostile action of the States and their agencies.

In the *Slaughter House Cases*, after referring to the definition of "privileges and immunities," as embracing the fundamental civil rights, including the right of ingress and egress, the Court said, referring to the opinion of Mr. Justice Washington (16 Wall. p. 76):

> "Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure."

The Court continued (*id.* p. 77):

> "It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that

those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States —such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government."

The precise point was ruled in *United States* v. *Harris*, 106 U. S. 629, 643. After examining the Thirteenth, Fourteenth and Fifteenth Amendments, the Court said with respect to the provision of the Constitution now under consideration:

> "There is only one other clause in the Constitution of the United States which can, in any degree, be supposed to sustain the section under consideration; namely, the second section of article 4, which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' *But this section*, like the Fourteenth Amendment, *is directed against State action*. Its object is to place the citizens of each State upon the same footing with citizens of other States, and inhibit discriminative legislation against them by other States. *Paul* v. *Virginia*, 8 Wall. 168." (Italics ours.)

See, also, *Hodges* v. *United States*, 203 U. S. 1, 15.

So clear is the proposition that subdivision 1 of Section 2 of Article IV confers a Federal right

only as against State action, that the Government expressly disclaims any reliance upon this constitutional provision (Govt's brief, p. 21). But if the provision, which was expressly inserted in the Constitution to guarantee the very right in question, was intended only to afford a Federal right of protection as against State action, upon what ground can it be said that some other right should be implied which gives a guarantee against the wrongful conduct of individuals? The application of elementary principles of construction should forbid the implication of a right of any broader content than that contained in the historic phrase which was designed to cover precisely the same matter. And this is true, whether tne right is viewed as one of residence within the State, or of "ingress", "egress", or "regress".

FOURTH:—The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a Federal right to protection as against the action of individuals, in the absence of action by a State.

In the original Constitution there was, as we have seen, no provision bearing upon the question, except subdivision 1 of Section 2 of Article IV, and in none of the Amendments is there any provision basing the alleged right, unless it be the Fourteenth Amendment.

This Amendment repeated the historic words "privileges and immunities", but they now appear as "privileges and immunities of *citizens of the United States.*" It established a Federal right

as against deprivation of life, liberty or property without due process of law. It gave a guarantee against denial to any person within the jurisdiction of a State of the equal protection of the laws.

But each one of the guarantees thus given by the Fourteenth Amendment was by its terms, and as each has been authoritatively construed, directed exclusively to action by the States. The Fourteenth Amendment gave no right of ingress or egress with respect to the States in the sense of a right of protection against kidnappers.

This was the pith of the decision in the *Slaughter House Cases,* where the examination of the rights conferred by the Federal Constitution, as it existed prior to the Fourteenth Amendment, was the prelude to the determination that the Fourteenth Amendment only secured rights as against State laws and proceedings. The inquiry in those cases was whether the introduction of the phrase "the privileges and immunities of citizens of the United States" altered the historic conception of "privileges and immunities" as theretofore protected by the Constitution. The Court said (16 Wall. p. 77):

> "Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States,* to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are those rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. * * * *

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

As was said in the *Civil Rights Cases, supra*:

"Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges." (109 U. S. p. 11).

It was recognized that the fundamental right of protection against deprivation of life, liberty and property without due process of law was a matter of the greatest importance to every citizen, but it was distinctly held that "until some State law has been passed, or some State action through its officers or agents has been taken, adverse to

the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority."

It is unnecessary to review the authorities already quoted at the beginning of this discussion for the purpose of emphasizing the distinction between the two classes of rights enjoyed under the Federal Constitution. As was said in *United States* v. *Cruikshank*, 92 U. S. 542, 555, with respect to the Fourteenth Amendment:

> "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more."

See, also, *Virginia* v. *Rives, supra, United States* v. *Harris, supra,* and other cases cited under Point First.

FIFTH:—If it be assumed that, apart from Section 2 of Article IV and the Fourteenth Amendment, there is an inherent Federal right of a citizen of the United States freely to cross the boundary of a State, it is of the essence of that right that it is one which exists only with respect to action by the States and their agencies. So far as mere individual liberty is concerned, in the absence of action by the States, the State boundary has no significance.

We have examined the only express provisions of the Constitution which can be said to embrace the right of free ingress and egress with respect to the States, and to reside and remain within a State. It has appeared, we think conclusively, that these provisions, according to the explicit decisions of this Court, do embrace the right in question, but that it is a right which, as a Federal right, is only one of protection as against State action.

Disregarding these express provisions of the Constitution, with their well defined meaning, the Government seeks to base a different right, not upon any express provision of the Constitution, but upon what is said to be the essential principle of the Constitution, that is, upon the creation through the Constitution of a Nation instead of a mere confederation of States.

We shall not attempt to follow the argument of the Government upon this point, as it covers very familiar ground, as to which there can be no controversy. Of course, the creation of a Nation involved the creation of rights of national citizenship, that is, of "privileges and immunities of citizens of the United States", to use the

historic phrase. It is undeniable that, by virtue of the formation of the Union, the States no longer enjoyed the right to "diplomatic correspondence, reprisals and war." As the Government says, there were new and different remedial rights which necessarily resulted from the creation of a Nation. But it is quite as well established that these new and different remedial rights did not change the fundamental status of personal rights which were left to the protection of the States, except as the creation of the Nation made it necessary to impose limitations upon the exercise of State authority. The creation of Federal power necessarily carried with it the denial of State power with respect to subjects to which that power had formerly extended, but the fact that State power was thus circumscribed through the delegation of essential power to the Federal government, in no way justifies the conclusion that individuals, in the absence of State action, obtained new guaranties of personal security as against other individuals. Such a view would have destroyed the whole conception of the relation of the Nation to the States. Instead of establishing a Federal government, there would have been a government absolutely centralized with the authority to establish and administer a complete code of municipal law governing all the rights of persons in their relation to each other. The entire course of the decisions of this Court is at war with such a conception.

If then it is possible, disregarding the express provision of subdivision 1 of Section 2 of Article IV, which actually did guarantee the right of ingress and egress with respect to States, as

against State action, to imply any similar right *inherent* in the national citizenship created by the Constitution, the same reasoning which led this Court to decide that the right expressly conferred was only directed at hostile State action would inevitably lead to the same conclusion as to the nature and limitations of the right thus sought to be derived from the whole plan of the Constitution as a right inherent in national citizenship. The description of the function of the national government, and the privileges and immunities of citizens of the United States, which is found in the Government's brief, only opens another path to the same result. It is protection against State discrimination or State action in derogation of freedom of travel and residence with which the Constitution is concerned, so far as there is a creation of a Federal right. Whether the right be deemed to be inherent, or is found in subdivision 1 of Section 2 of Article IV, or in the Fourteenth Amendment, it is essentially the same.

In other words, the State boundary is of consequence only when State power and State action are involved. In dealing with the offense of kidnapping or of false imprisonment or of libel or of assault or of murder, where the State and its agencies are not the actors, the State boundary is of no significance, and personal right is protected, as it always has been protected, under the laws of the State having jurisdiction.

We find nothing in the decision of *Crandall* v. *Nevada*, 6 Wall. 35, which in any way contravenes this well-settled distinction.

Crandall v. *Nevada* was the case of a tax imposed by the State on railroad and stage compa-

nies for every passenger carried out of the State. It was found to be a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel. It at once appears that a decision invalidating such a law has no relation to the right of an individual as against other individuals. The point of the decision was that the State had interfered with the freedom of citizens in their right of ingress and egress. In holding that the State had no power thus to restrict the right of the citizen to pass through the State, the Court manifestly dealt only with a right of protection against State action. Inasmuch as this was the right involved, and as it was protected only as against State action, it would make no difference whether the right rested on an express provision of the Constitution, or was supposed to be an inherent right under the Constitution. In either case, the hostile action of the State would be the same, and the same reasons for denying the validity of that action would exist.

The argument of the Government, therefore, derives no force from the decision itself, but is sought to be rested upon certain expressions in the opinion of the Court. These expressions, however, as we understand them, establish nothing different from the decision itself and wholly fail to support the Government's contention.

It was pointed out in eloquent and unforgettable words that the people of these United States constitute one nation; that the Government necessarily has a capital established by law, where its principal operations are conducted; that there sits its legislature; there resides the President; there is the seat of the supreme judicial power of the nation to which all its citizens have a right

to resort; there are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. To that place the Government had a right to call any or all of its citizens, and that right could not be made to depend upon the pleasure of a State over whose territory they must pass. The citizen had his correlative rights. He had the right to come to the seat of government to assert any claim he might have upon that government, to transact any business with it, to seek its protection, to share its offices, to engage in administering its functions. This right was independent of the will of any State over whose soil he must pass in the exercise of it.

These, in substance, were the rights which the Court found to exist. But the contention of the Government, based upon this description of rights, would seem to be a plain *non sequitur*. The Court described the right of the Government to call to its capital any or all of its citizens to aid in its service. But then the Court goes on to say that "this right cannot be made to depend *upon the pleasure of a State over whose territory they must pass.*" In other words, it was a Federal right, precisely like the right of ingress and egress guaranteed by subdivision 1 of Section 2 of Article IV, entitling the citizen to protection against the exercise of the will of the State in hostility to it.

Again, the Court says that the citizen has his correlative right to resort to the seat of government, and to free access to its seaports, but the Court at once defines the nature of the right by

saying that "*this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.*" That is, it is a right as against any interference by the State or any of its agencies which would prevent the citizen from crossing the State boundary or passing through the State in the exercise of his privilege.

The State had attempted to tax this privilege, and the question was whether this exercise of the taxing power of the State could be sustained, or whether it was obnoxious to the constitutional operations of the Government and the rights which its citizens held under it. The Court held that the question was not of the extent of the tax, but of the right to levy such a tax which might burden the transportation of persons from one part of the country to another and make the national government dependent upon the States. The pith of the decision is found in the statement at the close of the opinion, quoted from the *Passenger Cases*: "We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it." (6 Wall. p. 49).

It is quite apparent that there are two conceptions of the right "to reside and remain within a State", to "pass through a State", or of "ingress or egress" with respect to any State. The one

right is the ordinary right of personal liberty, the right as against individuals, the right not to be falsely imprisoned, not to be kidnapped, not to be assaulted, not to be prevented by force or threats from residing or working where one wills. This right, as embraced in the fundamental rights of life, liberty and property, is left, as it always has been, to the protection of the States. The other right is a Federal right, a right protected by subdivision 1 of Section 2 of Article IV of the Constitution, protected by the Fourteenth Amendment, and also, it may be said, inherent in the organization of the Federal government, and this, as a Federal right, is one of protection against the hostile action of the States or of its agencies which seek to make State boundaries a basis for interference with the freedom of travel and of pursuits, and thus render national life and national citizenship impossible.

Nor is there anything inconsistent with this view in the reference to *Crandall* v. *Nevada*, which is found in the *Slaughter House Cases*. On the contrary, Mr. Justice Miller, who had written the opinion of this Court in *Crandall* v. *Nevada*, in writing the opinion in the *Slaughter House Cases*, took the right of national citizenship which had been protected in the *Crandall* case and used it as an illustration of the rights embraced within the privileges and immunities protected by the Fourteenth Amendment. Mr. Justice Miller did not attempt to differentiate this right, which he had so strongly supported in the *Crandall* case, as being essentially different from other rights protected by the Fourteenth Amendment, or from other privileges and immunities which, according to the historic phrase of the Constitution, were en-

titled to Federal protection. He took the right which had been sustained in the *Crandall* case and brought it within the category of those national rights which were to be protected under the Fourteenth Amendment. But, thus defined, it was a right, as it always had been, and as it had been held to be in the *Crandall* case, to protection simply as against State action. Instead of the Government gaining anything from the fact that the decision in the *Crandall* case antedated the Fourteenth Amendment, the really significant fact is that the right protected in the *Crandall* case was left with the same quality and was entitled to the same measure of protection under the Fourteenth Amendment as it had been before. The Court, referring to the *Crandall* case, quoted what had there been said as to the right of access to the seat of Government, and to freedom of travel, as describing one of "the privileges and immunities of citizens of the United States." It was these privileges and immunities to which the Fourteenth Amendment referred, and the point of the reference made by the *Slaughter House Cases* to the *Crandall* case, instead of supporting the contention of the Government in this case, is, we submit, quite in opposition to it. The Fourteenth Amendment itself, like the earlier provision of the Constitution, only gave protection as against the action of the States and their agencies, and the inherent right derived from the nature of our government went no further. The *Crandall* case enforced the protection as against State action; the *Slaughter House Cases* held that it was protection as against State action which the constitutional provisions were designed to protect.

In the present case, there is no action of the State, or under its authority. The invasion of personal liberty complained of is punishable under the State law. The reference in the charge to the State boundary in no way changes the nature of the assault upon the security of the persons described. Their right to reside and remain at Bisbee was a right which they enjoyed under the Constitution and laws of Arizona, and so far as they had a Federal right, it was a right to be protected against hostile State action, and from that action they have not suffered.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA, PLAINTIFF in error,

v.

HARRY C. WHEELER ET EL.

No. 292.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

REPLY BRIEF ON BEHALF OF THE UNITED STATES.

We desire to say a word in reply to the brief of counsel for the defendants in error in order to point out a break in its reasoning, and a practical admission of our claim. After discussing in points 1 to 4 (Brief, pp. 11–42) section 19 of the Criminal Code in connection with section 2 of Article IV and Article XIV of the Amendments of the Constitution, and arguing (what we admit) that these particular provisions prohibit only action by one of the several States, they are, in Point V (Brief, pp. 42–50), driven by the decision in *Crandall* v. *Nevada* (6 Wall. 35) to practically admit that a citizen of the United States had, prior to the adoption of Article XIV,

and without reference to section 2 of Article IV, a right inherent in the Constitution of the United States as originally enacted to free ingress and egress to and from a State. This right, however (they say), was only and could only be protected against State action. It could not therefore be constitutionally protected against action by individuals. This court, however, held in *United States* v. *Mosley* (238 U. S. 383) that section 19, Criminal Code, constitutionally protected all Federal rights against conspiracies of individuals. The result is that the admission of counsel brings the case at bar squarely within section 19. Criminal Code.

The matter may be looked at in another way. Counsel in effect admit, under Point V, that the right of free ingress and egress to and from a State is a right secured inherently by the Constitution, like the right to vote for Congressmen, the right to serve as a Federal officer, etc., etc. They further admit that these latter rights can constitutionally be protected against acts of individuals, and that section 19, Criminal Code, does this. How, then, can counsel, with any reason or authority, claim that the right of free ingress and egress differs from all the other rights of its class in this important particular, viz, that it is protected only from the act of the State, while the others are all equally protected from the acts of individuals?

The error lying at the bottom of counsel's argument consists (we submit) in a misunderstanding of the

fourteenth amendment. That amendment contains three different provisions:

> 1. That defining "citizens of the United States";
>
> 2. That prohibiting the States from abridging the privileges or immunities of such citizens;
>
> 3. That prohibiting the States from depriving *any person* of life, liberty, or property without due process of law.

None of these provisions "secured" any right to a *citizen, as such*, except the first, and that did so (if it did so at all) only by defining more specifically the term "citizens of the United States." The third did not depend on citizenship at all, and therefore secured no rights arising solely out of that status. The rights referred to in it existed prior to the Constitution, and the fourteenth amendment merely laid an obligation on the United States to see that they were protected by the several States (as clearly pointed out by this court in *United States* v. *Cruikshank*, 92 U. S. 542, 554, 555). As to the second (which is the one mainly relied on by counsel for defendants in error), it is equally true that it "secured" no rights to citizens of the United States which they did not have prior to its enactment. In this respect there can be no doubt that the dissenting justices in the *Slaughter House Cases* were right. There never was a time since the adoption of the original Constitution that a State, conforming to that instrument, could have deprived a citizen of the United States

of his privileges or immunities as such (adopting the construction of the scope of such privileges or immunities given by this court in the *Slaughter House Cases*). The amendment therefore added nothing to such privileges or immunities. It certainly took nothing from them. And since, before the amendment, such privileges or immunities could constitutionally be protected in any manner and against any injuries which Congress thought proper to the end of securing them, they could be protected to the same extent after the amendment. Since before the amendment Congress could constitutionally protect such privileges or immunities by acting directly on the individuals who injured them, not being confined to acting in this regard merely as surety for the several States, so after the amendment it had without question the same direct power.

ROBERT P. STEWART,
Assistant Attorney General.
W. C. HERRON,
Attorney.

UNITED STATES *v.* WHEELER ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

No. 68. Argued April 28, 1920.—Decided December 13, 1920.

1. In all the States, from the beginning down to the establishment of the Articles of Confederation, the citizens possessed the right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom. A consequent authority resided in the States to forbid and punish violations of this right. P. 293.
2. Uniformity of this right was secured by the Articles of Confederation, not by lodging power in Congress to deal with the subject, but by subjecting the continued state power to the limitation that it should not be used to discriminate, Art. IV providing that the free inhabitants of each State, with certain exceptions, should be entitled to all the privileges and immunities of free citizens in the several States, and that the people of each State should have free ingress and regress to and from any other State. P. 294.
3. The Constitution, by Art. IV, § 2, plainly intended to preserve and enforce this limitation imposed upon the several States by Art. IV of the Articles of Confederation, and in so doing necessarily assumed that the States possessed the authority to protect the right of free residence, ingress and regress as a part of their reserved power. *Id.*
4. The Constitution does not guarantee this right against wrongful interference by individuals, but only against discriminatory action by States. P. 297. *Crandall* v. *Nevada*, 6 Wall. 35, distinguished.

5. A conspiracy to deprive citizens of the United States of their right to remain in a particular State, by seizing them and deporting them to another State, is not an offense under § 19 of the Criminal Code.

254 Fed. Rep. 611, affirmed.

THE case is stated in the opinion.

Mr. W. C. Herron, with whom *Mr. Assistant Attorney General Stewart* was on the briefs, for the United States:

Our claim, and our entire claim, is that the right of free ingress and egress is secured, not by any express provision of the Constitution (except in so far as the Fourteenth Amendment enlarges the scope of the term "citizen of the United States"), but impliedly by the creation of citizenship of the United States, as contradistinguished from purely state citizenship, which the Constitution as certainly and immediately effected as it did the Union itself. It was "the people of the United States" who ordained and established the Constitution, and it was they who, upon its ordination and establishment, became citizens of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316, 403, 404.

Prior to the Constitution the rights of such persons (if any) would be governed by international or municipal law. They would not differ materially in this respect from the rights of persons who were expelled at the present day from one of the United States into Canada or Mexico. In so far as the political bodies themselves were concerned, the only action possible would be diplomatic correspondence, followed (it may be) by reprisals or even by war. In so far as the individuals injured were concerned, there might be, either under international or under municipal law, prosecutions in the State *ab quo*, or, perhaps in the State *ad quem*, if it could be said that the crime was consummated in the latter.

What would be the situation after the Constitution?

For, in so far as greater or additional rights appear at the later period, such greater or additional rights must necessarily be rights granted and hence secured by the Constitution.

As to the political bodies, the right to diplomatic correspondence, reprisals, and war was expressly taken away by the Constitution, Art. I, § 10, and there arose therefrom a new and different remedial right, viz., the right to sue in the federal courts either the political body or the individuals responsible for the damage. *South Carolina* v. *Georgia*, 93 U. S. 4, 9; *Missouri* v. *Illinois*, 180 U. S. 208, 241; *s. c.*, 200 U. S. 496, 518–520; *Kansas* v. *Colorado*, 185 U. S. 125, 146, 147; *s. c.*, 206 U. S. 46, 96, 97; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237.

The question is, Did the Constitution change the situation, as respects the individuals injured, in any respect? Did it give them greater or additional rights? Or did it leave them as to their rights in the same situation in which it found them? Whereas before they were merely citizens of one particular State, being aliens in a sense to all others, they now became in addition citizens of the United States. This was implied in the very formation of the Federal Union. A new allegiance was created with a new corresponding duty in the liege of protection to the subjects. They came within the "peace of the United States." *In re Neagle*, 135 U. S. 1, 69. Their progress therefore from one State to another (or into the Territories), their egress from one, their ingress into another, while it might find them in places where their state citizenship would not give them all the rights it did at their domiciles, would never find them in any place where the all-prevailing quality of citizenship of the United States would not accompany them, with all the rights, substantive and remedial, which the term denotes.

It is important to emphasize the fact (as we claim)

that federal citizenship, with all its main privileges and immunities, came from the very fact of the institution of the new government under the Constitution, and not from the Fourteenth Amendment. Of this there can be no possible doubt.

It was early assumed and held, that the Constitution impliedly created a citizenship of the United States, and it followed necessarily that it also impliedly secured the requisite privileges and immunities of such a status. 1 Stat. 103; *Talbot* v. *Jansen*, 3 Dall. 133, 136, 153, 154; *State* v. *Hunt*, 2 Hill, 1, 218–220; *Hepburn* v. *Ellzey*, 2 Cranch, 445; *New Orleans* v. *Winter*, 1 Wheat. 91; *American Insurance Co.* v. *Canter*, 1 Pet. 511, 542; *Gassies* v. *Ballon*, 6 Pet. 761; *Lynch* v. *Clarke*, 1 Sandf. Ch. Rep. 583, 640, 641, 642; *Prentiss* v. *Brennan*, 2 Blatchf. 162, 164, 165; *Minor* v. *Happersett*, 21 Wall. 162, 165–167.

The right of a citizen of one of the States to free ingress and regress to or from another State (a right somewhat similar to the one set up in the indictment in the case at bar), is secured in some sense by § 2 of Art. IV of the Constitution. *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Paul* v. *Virginia*, 8 Wall. 168, 180; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Slaughter-House Cases*, 16 Wall. 36, 75. We, however, expressly disclaim any reliance upon this constitutional provision. It was held in the *Slaughter-House Cases*, *supra*, that the rights referred to in § 2 of Art. IV are the fundamental rights of citizenship, as such, and not the rights peculiarly conferred upon the citizens of the United States first created by the Constitution. The rights of ingress and regress are impliedly included in § 2 of Art. IV merely because included in the fundamental rights to life, liberty, and the pursuit of happiness. These rights a citizen of a State is entitled to as such. The outland citizen acquires this right under the Constitution solely because the domestic citizen has it, and only to the same extent. He is entitled only to be free from discrim-

ination by the State, without "reasonable ground for the diversity of treatment." *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60. His only remedy, therefore, under § 2 of Art. IV for actions such as are complained of in the case at bar would be by prosecution in the state courts, if the laws of the State provided such a remedy. It is possible that Congress might provide a remedy, if the State discriminated against him, in regard to such outrages, on account of his outland citizenship; but Congress (so far as we are aware) has never done so. At any rate § 19, Crim. Code, does not do so. It is therefore not enough in the case at bar to show that the right set up in the indictment is a fundamental right common to all citizens of civilized States everywhere. It must be shown in addition that it is a right peculiar to the complex, federal citizenship which is at the basis of the "indissoluble Union of indestructible States" created by the Constitution of the United States.

In this term "citizen of the United States," are included two fundamental concepts, bound together and interacting, viz., the concept of "the United States" as a corporate entity, exercising full and paramount sovereignty within its constitutional powers over all the persons within its territorial limits, and the concept of the several States as a collective body, retaining all their sovereign powers and activities over the persons within their territorial limits except in so far as those powers have been granted to the collective aggregate. Langdell, 12 Harvard Law Rev. 365, 367–370; *Tennessee* v. *Davis*, 100 U. S. 257, 263; *Ex parte Siebold*, 100 U. S. 371, 394; *Hoke* v. *United States*, 227 U. S. 308, 321, 322.

The existence of the States prevents a citizen of the United States from deriving, as such, a right under the Constitution to territorial mobility within the limits of any particular State. To that extent he is dependent upon the laws and agencies of the several States. The right, how-

ever, to move freely, *sua intuitu*, from one State into another is an entirely different matter and brings into the problem the concept of the Union. It is a right necessarily inherent in federal citizenship and secured, therefore, by the Constitution. Unless this be true, no Union was in fact established in 1789, because no less than this can be properly attributed to citizenship of the United States.

The injury done by the defendants in this case has a double aspect, one toward the individuals deported and the other toward the State into which they were deported. By their deportation the individuals became, or might become, a charge upon the State of New Mexico, a disturbance of its peace, or an offense to its own state policy. According to the decisions of this court, and especially *Kansas* v. *Colorado*, and *Missouri* v. *Illinois*, *supra*, the offended State was secured by the Constitution a right to sue the offending State in the federal courts, and to have applied there, not the law of the offending State, but a general or international law. Is not this a strong reason for believing that the Constitution also secured a right to the individuals, not as citizens of Arizona but as citizens of the United States, to have their cases determined in a federal court by federal law?

In every case in which this court has applied § 19, Crim. Code, the claim that the offense was only assault, murder, kidnapping, etc., could have been, and in some of them evidently was made. Yet this court upheld the federal jurisdiction because the real purpose of the conspiracy was, not to murder, assault, etc., but to prevent voting, to prevent informing of crime, to prevent egress from a State. *United States* v. *Waddell*, 112 U. S. 76, 80; *Buchanan* v. *United States*, 233 Fed. Rep. 257.

The Fourteenth Amendment has had no effect upon the question presented in this case, except incidentally in so far as it has, perhaps, enlarged and constitutionally fixed

the status of a citizen of the United States. That status was fully recognized before the Amendment. See the discussion, including the decision by Mr. Justice Johnson in *Ex parte Eckstein*, and an opinion by Attorney General Wirt, relative to acts of South Carolina affecting the ingress and egress of free negroes. (Reports Committees, 27th Cong., 3d sess., House Rep. 80, pp. 15, 27, 35; Mass. Legal Docs., 1845, Senate No. 31.) See also *Prigg* v. *Pennsylvania*, 16 Pet. 539; *Passenger Cases*, 7 How. 283, 465–467, 492; *Crandall* v. *Nevada*, 6 Wall. 35, 43–45. *Crandall* v. *Nevada* has been referred to by this court in later cases with full approval, and undoubtedly represents the settled law. It is on principle decisive of the case at bar. *Slaughter-House Cases*, 16 Wall. 36, 79, 80; *Twining* v. *New Jersey*, 211 U. S. 78, 97, 98; Cooley, Principles of Constitutional Law, pp. 245, 246.

The point that in *Crandall* v. *Nevada*, the action complained of was by the State itself, whereas in the case at bar it is by individuals, does not distinguish that case from this one. If the right be one secured by the Constitution, Congress may protect it against action by individuals, as well as against action by the State, if it deem the former mode appropriate to the end. This is decided in *Prigg* v. *Pennsylvania*, *supra*. The Fourteenth Amendment expressly banned state action, but it did not limit the general and original power of Congress to protect rights secured by the Constitution in such manner as it thought most effective. This is proved by the case of *Crandall* v. *Nevada* itself, which arose prior to the Fourteenth Amendment and can therefore derive no assistance from its provisions. The fact that only state action was before the court in that case proves nothing as to the question whether a right of a citizen is secured under the Constitution only against state action. Indeed, the fallacy of the argument is shown by all the decisions which have held § 19, Crim. Code, constitutional. Particular reference may be made

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to the statement of this court in *United States* v. *Reese*, 92 U. S. 214, 217.

As for the authorities after the Fourteenth Amendment, [*Slaughter-House Cases*, 16 Wall. 36, where the court stated that a citizen of the United States has a right specially secured under the Amendment to reside in a State for the purpose of acquiring citizenship therein—a right clearly violated in the case at bar—Justice Bradley's dissenting opinion, 16 Wall. 112, 113; *United States* v. *Reese*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127; *United States* v. *Cruikshank*, 92 U. S. 542, 552, 553; *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651, 663–666; *Wiley* v. *Sinkler*, 179 U. S. 58; *Swafford* v. *Templeton*, 185 U. S. 487; *United States* v. *Mosley*, 238 U. S. 383, 386; *United States* v. *O'Toole*, 243 U. S. 476, 485–489; *United States* v. *Bathgate*, 246 U. S. 220; *United States* v. *Harris*, 106 U. S. 629; *Hodges* v. *United States*, 203 U. S. 1, 14; *United States* v. *Powell*, 212 U. S. 564; compare *United States* v. *Shipp*, 203 U. S. 563; *Logan* v. *United States*, 144 U. S. 263, 293–295; *United States* v. *Waddell*, 112 U. S. 76, 80; *In re Quarles*, 158 U. S. 532, 536; *Motes* v. *United States*, 178 U. S. 458, 462, 463; *Baldwin* v. *Franks*, 120 U. S. 678; *United States* v. *Patrick*, 54 Fed. Rep. 338, 347,] we submit that the decisions of this court on the subject of the rights secured by the Constitution to a citizen of the United States show not only that these rulings do not in any manner or to any extent limit or qualify the principles made the basis of the judgment in *Crandall* v. *Nevada*, *supra*, but that they reinforce that decision by the uniform and consistent opinion of this court that § 19, Crim. Code, constitutionally covers every right of a citizen of the United States, as such, whether it arise from some express provision of the Constitution, or whether it be implied in the very organization and healthy operations of the Na-

tional Government which substituted for a mere league of States and a single state citizenship a real, vital Union based upon a citizenship of the United States.

Mr. Charles E. Hughes, with whom *Mr. E. E. Ellinwood*, *Mr. John Mason Ross* and *Mr. Clifton Mathews* were on the brief, for defendants in error:

There are two classes of rights enjoyed by citizens of the United States, as such, (a) rights by which one is entitled to protection merely against action by or on behalf of States where that action is in conflict with the provisions of the Federal Constitution, and (b) rights by which one is entitled to protection against the action of individuals. Section 19, Crim. Code, is not concerned with the former, but exclusively with the latter.

This distinction between federal rights which protect the citizen simply against state action, and federal rights which protect the citizen against the action of individuals, abundantly established by decisions of this court (*United States* v. *Cruikshank*, 92 U. S. 542, 554, 555; *Virginia* v. *Rives*, 100 U. S. 313, 318; *United States* v. *Harris*, 106 U. S. 629, 639; *Civil Rights Cases*, 109 U. S. 3, 11–13; *James* v. *Bowman*, 190 U. S. 127; *Barney* v. *City of New York*, 193 U. S. 430; *Hodges* v. *United States*, 203 U. S. 1, 14–16) has been disregarded in this prosecution. See also *Karem* v. *United States*, 121 Fed. Rep. 250; *United States* v. *Moore*, 129 Fed. Rep. 630; *United States* v. *Powell*, 151 Fed. Rep. 648, affd. 212 U. S. 564.

It thus appears that it is not enough for the Government to establish that there is a federal right, in order to invoke § 19, if it appears, as we submit it does clearly appear in the present case, that the right is of that class which connotes protection only against state action.

The decisions may be searched in vain for any authoritative precedent applying § 19, unless there is a right to protection as against individual action and not simply as

against state action. *Ex parte Yarbrough*, 110 U. S. 651; *Guinn* v. *United States*, 238 U. S. 347; *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Butler*, Fed. Cas. No. 14,700; *United States* v. *Crosby*, Fed. Cas. No. 14,893; *Felix* v. *United States*, 186 Fed. Rep. 685; *United States* v. *Stone*, 188 Fed. Rep. 836; *Aczel* v. *United States*, 232 Fed. Rep. 652; *United States* v. *Waddell*, 112 U. S. 76; *Haynes* v. *United States*, 101 Fed. Rep. 817; *Buchanan* v. *United States*, 233 Fed. Rep. 257; *Logan* v. *United States*, 144 U. S. 263; *In re Quarles*, 158 U. S. 532; *Motes* v. *United States*, 178 U. S. 458; *United States* v. *Lancaster*, 44 Fed. Rep. 885, 896; *United States* v. *Patrick*, 54 Fed. Rep. 338; *Davis* v. *United States*, 107 Fed. Rep. 753; *United States* v. *Morris*, 125 Fed. Rep. 322; *Smith* v. *United States*, 157 Fed. Rep. 721.

As examples of prosecutions which have failed because of the prosecutor's inability to point out, to the satisfaction of the court, the constitutional provision securing the right said to have been conspired against, see: *United States* v. *Cruikshank*, 92 U. S. 542; *Hodges* v. *United States*, 203 U. S. 1; *United States* v. *Gradwell*, 243 U. S. 476; *Karem* v. *United States*, 121 Fed. Rep. 250; *McKenna* v. *United States*, 127 Fed. Rep. 88; *United States* v. *Eberhart*, 127 Fed. Rep. 254; *United States* v. *Moore*, 129 Fed. Rep. 630; *United States* v. *Powell*, 151 Fed. Rep. 648, affd. 212 U. S. 564; *United States* v. *Bathgate*, 246 U. S. 220.

The right of a citizen of the United States to reside and work within the bounds of the United States wherever he may choose is a fundamental right pertaining to his individual liberty. Like other fundamental rights of life, liberty, and property, so far as interference therewith on the part of individuals is concerned, it is a right which the Constitution of the United States leaves to the protection of the several States having jurisdiction. So far as there is a right pertaining to federal citizenship to have free ingress or egress with respect to the several States, the right is

essentially one of protection against the action of the States themselves and of those acting under their authority. *Slaughter-House Cases*, 16 Wall. 36, 76; *Corfield* v. *Coryell*, 4 Wash. C. C. 371.

The privileges and immunities clause of Art. IV, § 2, does not confer a right of protection against the acts of individuals, but is aimed at the hostile action of the States. It is this clause which gives the citizens of the several States "the right of free ingress into other States, and egress from them." *Paul* v. *Virginia*, 8 Wall. 168, 180; *Slaughter-House Cases*, 16 Wall. 36, 75; *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 381; *Ward* v. *Maryland*, 12 Wall. 418, 430. It confers no right whatever with respect to the action of individuals, but only affords protection as against the hostile action of the States and their agencies. *Slaughter-House Cases*, *supra*, 76, 77; *United States* v. *Harris*, 106 U. S. 629, 643. See also, *Hodges* v. *United States*, 203 U. S. 1, 15.

The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a federal right to protection as against the action of individuals, in the absence of action by a State. *Slaughter-House Cases*, *supra*, 77; *Civil Rights Cases*, *supra*, 11; *United States* v. *Cruikshank*, 92 U. S. 542, 555. See also *Virginia* v. *Rives*, *supra*, and *United States* v. *Harris*, *supra*.

If it be assumed that, apart from § 2 of Art. IV and the Fourteenth Amendment there is an inherent federal right of a citizen of the United States freely to cross the boundary of a State, it is of the essence of that right that it is one which exists only with respect to action by the States and their agencies. So far as mere individual liberty is concerned, in the absence of action by the States, the State boundary has no significance.

In dealing with the offense of kidnapping or of false imprisonment or of libel or of assault or of murder, where the State and its agencies are not the actors, the state

boundary is of no significance, and personal right is protected, as it always has been protected, under the laws of the State having jurisdiction. We find nothing in *Crandall* v. *Nevada*, 6 Wall. 35, which in any way contravenes this well-settled distinction.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The case is here under the Criminal Appeals Act to directly review a judgment quashing an indictment against the 25 persons who are defendants in error. The indictment contained four counts, but as the fourth is now abandoned by the Government we need not consider it.

The first count charged the accused with conspiring, in violation of § 19 of the Criminal Code, to injure, oppress, threaten, or intimidate 221 named persons, alleged to be citizens of the United States residing in Arizona, of rights or privileges secured to them by the Constitution or laws of the United States, that is to say, the right and privilege pertaining to citizens of said State peacefully to reside and remain therein and to be immune from unlawful deportation from that State to another. And the overt acts alleged were: The arming of the conspirators; the seizure and holding of the persons named until by means of a railway train procured for that purpose they were forcibly transported into New Mexico and in that State released under threat of death or great bodily harm should they ever return to the State of Arizona.

The second count was the same as the first except that only 25 of the persons alleged in the first count to have been injured were named, and they were stated to be citizens of the United States residing in but not citizens of the State of Arizona.

The third count was also identical with the first except that it embraced only 196 of the injured persons named in

the first count and one additional person not therein named, all being declared to be citizens of the United States and of the State of Arizona residing in that State.

The court quashed the indictment on the ground that no power had been delegated by the Constitution to the United States to forbid and punish the wrongful acts complained of, as the right to do so was exclusively within the authority reserved by that instrument to the several States. As the entire case will be disposed of by testing the accuracy of this view we come immediately to consider that subject.

In argument the asserted error in the conclusion is based, not upon the direct result of any particular provision of the Constitution, but upon implications arising from that instrument as a whole, the conditions existing at the time of its adoption, and the consequences inevitably produced from the creation by it of the Government of the United States. A wide field of inquiry common to all the contentions is thus opened. In order, therefore, to afford a common basis by which to measure the correctness of the various implications insisted upon, we state under separate headings doctrines which are applicable to all the contentions and which are in reason so well founded and so conclusively sustained by authority as to be indisputable.

(a) In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380–381; *Slaughter-House Cases*, 16 Wall. 36, 76.

(b) Whether, in disregard of the principles of comity, any of the States recognized in their own citizens rights on

this subject which they refused to grant to citizens of other States, we need not consider, in view of the provision of the Articles of Confederation on the subject. By that provision uniformity was secured, not by lodging power in Congress to deal with the subject, but, while reserving in the several States the authority which they had theretofore enjoyed, yet subjecting such authority to a limitation inhibiting the power from being used to discriminate. The text of Article IV which provides for this subject is as follows:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, . . ."

Thus, while power remained in the several States, the boundaries demarking them became, at least for the purpose of the enjoyment of the right here in question, negligible, and the frontiers of the Confederation became the measure of the equal right secured to the inhabitants of each and all the States.

(c) That the Constitution plainly intended to preserve and enforce the limitation as to discrimination imposed upon the States by Article IV of the Articles of Confederation, and thus necessarily assumed the continued possession by the States of the reserved power to deal with free residence, ingress and egress, cannot be denied for the following reasons: (1) Because the text of Article IV, § 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and (2) because that view has been so conclusively settled as to leave no room for controversy. Thus

in *Paul* v. *Virginia*, 8 Wall. 168, 180, considering the operation and effect of Article IV, § 2, of the Constitution, it was said:

"It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

"Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privileges with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

Again, in *Ward* v. *Maryland*, 12 Wall. 418, 430, upon the same subject, the court declared:

"Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire per-

sonal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

In the *Slaughter-House Cases*, 16 Wall. 36, 75–76, the court, after reciting both the provisions of Article IV of the Articles of Confederation and Article IV, § 2, of the Constitution, said:

"There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

"Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.

"'The inquiry,' he says 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.'

"This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward* v. *The State of Maryland*, while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure."

The controlling influence of the opinion in the *Slaughter-House Cases*, as well as that of Mr. Justice Washington in *Corfield* v. *Coryell*, stands out in bolder relief when it is observed that in the latter case, following the statement of the general principles contained in the passage quoted in the *Slaughter-House Cases*, there is found, by way of illustration, an enumeration of particular rights declared to be clearly embraced by the general principles, one of which is described as, "The right of a citizen of one state to pass through, or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."

Applying these doctrines, let us come to test the soundness of the implications from the Constitution relied upon to establish the absence of all state authority to deal with the individual wrongs complained of, and the possession by the Federal Government of power for that purpose; and, as pertinent thereto, to refer briefly to the authorities which it is assumed sustain those implications.

Undoubtedly the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from,

the several States had, prior to the Confederation, a two-fold aspect: (1) as possessed in their own States and (2) as enjoyed in virtue of the comity of other States. But although the Constitution fused these distinct rights into one by providing that one State should not deny to the citizens of other States rights given to its own citizens, no basis is afforded for contending that a wrongful prevention by an individual of the enjoyment by a citizen of one State in another of rights possessed in that State by its own citizens was a violation of a right afforded by the Constitution. This is the necessary result of Article IV, § 2, which reserves to the several States authority over the subject, limited by the restriction against state discriminatory action, hence excluding federal authority except where invoked to enforce the limitation, which is not here the case; a conclusion expressly sustained by the ruling in *United States* v. *Harris*, 106 U. S. 629, 645, to the effect that the second section of Article IV, like the Fourteenth Amendment, is directed alone against state action. And this was but a summary of what had been previously pointed out in the *Slaughter-House Cases*, 16 Wall. 36, where in dealing with the privileges and immunities embraced by Article IV, § 2, of the Constitution, it was observed (p. 77):

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power

of the States, and without that of the Federal government."

Nor is the situation changed by assuming that as a State has the power, by depriving its own citizens of the right to reside peacefully therein and to free ingress thereto and egress therefrom, it may, without violating the prohibitions of Article IV against discrimination, apply a like rule to citizens of other States, and hence engender, outside of Article IV, a federal right. This must be so since the proposition assumes that a State could, without violating the fundamental limitations of the Constitution other than those of Article IV, § 2, enact legislation incompatible with its existence as a free government and destructive of the fundamental rights of its citizens; and furthermore, because the premise upon which the proposition rests is state action and the existence of federal power to determine the repugnancy of such action to the Constitution, matters which, not being here involved, are not disputed.

This leads us furthermore to point out that the case of *Crandall* v. *Nevada*, 6 Wall. 35, so much relied upon in the argument, is inapplicable, not only because it involved the validity of state action, but because the state statute considered in that case was held to directly burden the performance by the United States of its governmental functions and also to limit rights of the citizens growing out of such functions; and hence it also follows that the observation made in *Twining* v. *New Jersey*, 211 U. S. 78, 97, to the effect that it had been held in the *Crandall Case* that the privilege of passing from State to State is an attribute of national citizenship, may here be put out of view as inapposite.

With the object of confining our decision to the case before us, we say that nothing we have stated must be considered as implying a want of power in the United States to restrain acts which, although involving ingress or

egress into or from a State, have for their direct and necessary effect an interference with the performance of duties which it is incumbent upon the United States to discharge, as illustrated in the *Crandall Case, supra.*

Judgment affirmed.

MR. JUSTICE CLARKE dissents.